Jurisdictional Statement

81-734

Office - Supreme Court, U.S.
FILED
OCT 16 1981
ALEXANDER L. STEVAS,
CLERK

No.....

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

CENTRAL AVENUE NEWS, INC., AND DONALD G. GITTELSON,
Appellants,

vs.

THE CITY OF MINOT, A MUNICIPAL CORPORATION AND POLITICAL SUBDIVISION OF THE STATE OF NORTH DAKOTA, AND STATE OF NORTH DAKOTA ex rel. CARROLL ERICKSON,
Appellees,

ON APPEAL FROM THE SUPREME COURT OF NORTH DAKOTA
JURISDICTIONAL STATEMENT

ARTHUR M. SCHWARTZ, P.C.
Counsel of Record
The Market Center
1650 Market Street
Denver, CO 80202
(303) 893-2500

TIMOTHY J. AUSTIN
P.O. Box 785
Mandan, North Dakota 58554
(701) 663-9818
Attorneys for Appellants

October __, 1981

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No......

CENTRAL AVENUE NEWS, INC., AND
DONALD G. GITTELSON,
Appellants,

vs.

THE CITY OF MINOT, A MUNICIPAL CORPORATION AND POLITICAL SUBDIVISION OF THE STATE OF NORTH DAKOTA, AND STATE OF NORTH DAKOTA ex rel. CARROLL ERICKSON,
Appellees,

ON APPEAL FROM THE SUPREME COURT OF NORTH DAKOTA
JURISDICTIONAL STATEMENT

QUESTIONS PRESENTED

1. Whether a licensing ordinance which imposes a $300.00 annual fee on the operation of each and every amusement device depicting presumptively protected sexually explicit material constitutes an impermissible prior restraint on free speech, when that fee is admittedly used to fund the enforcement of a separate and totally unrelated obscenity statute.

2. Whether a city zoning ordinance which totally excludes adult entertainment centers from commercial areas within the city and permits them to locate only in heavy

industrial zones, and then only 1250 feet from pre-existing churches, schools and residential zones, places an impermissible restraint on freedom of speech in violation of the First and Fourteenth Amendments to the United States Constitution and is violative of the principles articulated by this Court in *Schad v. Borough of Mount Ephraim*, 101 S.Ct. 2176 (1981) in that no evidence of justification was offered.

TABLE OF CONTENTS AND TABLE OF AUTHORITIES

Index	*Page*
Questions Presented	1
Table of Contents and Authorities	2
Opinions Below	3
Jurisdiction	4
Constitutional Provisions, Statutes and Ordinances	4
Statement of the Case	7
The Questions Are Substantial	9
Appendix	23

CITATIONS

	Page
Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963)	11
Bayside Enterprises, Inc. v. Carson, 450 F.Supp. 696 (M.D. Fla. 1978)	13
Blue Island v. Kozul, 379 Ill. 511, 41 N.E.2d 815	12
Cox v. New Hampshire, 312 U.S. 569 (1941)	12
E & B Enterprises v. City of University Park, 449 F.Supp. 695 (N.D. Texas 1977)	21

Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) 10

Fiske v. Kansas, 274 U.S. 380 (1927) 12

Gitlow v. New York, 268 U.S. 652 (1925) 12

Grosjean v. American Press Co., 297 U.S. 233 (1936) 10, 11

Heller v. State of New York, 413 U.S. 483 (1973) 10

Lo-Ji Sales, Inc., 442 U.S. 319 (1979) 10

Moore v. City of East Cleveland, 431 U.S. 494 (1977) 18, 20

Murdock v. The Commonwealth of Pennsylvania, 319 U.S. 105 (1943) 10, 11, 12, 13, 15, 16

New York Times v. United States, 403 U.S. 713 (1971) 11

Schad v. Borough of Mount Ephraim, ...US ....., 101 S. Ct. 2176 (1981) 2, 18, 21

Schneider v. Irvington, 308 U.S. 147 (1939) 12, 19

Steffel v. Thompson, 415 U.S. 452 (1974) 16

Stromberg v. California, 283 U.S. 359 (1931) 12

Village of Belle Terre v. Boraas 416 U.S. 1 (1974) 18

Village of Schamburg v. Citizens For a Better Environment, 444 U.S. 620 (1980) 19

Wendling v. City of Duluth, 495 F.Supp. 1380 (D. Minn. 1980) 12, 13, 14, 15, 16

Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) 17, 18, 21

OPINIONS BELOW

The opinion of the Supreme Court of North Dakota, which appears in the Appendix, p. 23, is reported at 308 NW2d 851 (ND 1981).

The memorandum opinion of the District Court of Ward County, dated September 17, 1980, is not reported.

It is reprinted in the Appendix, p. 62. The District Court of Ward County entered its Findings of Fact, Conclusions of Law and Order for Judgment and Judgment on October 6, 1980. They are not reported but are reprinted in the Appendix, pp. 75, 83.

JURISDICTION

This is an appeal from a decision upholding the validity of two city ordinances against federal constitutional attack. The judgment of the Supreme Court of North Dakota, upholding the constitutionality of the challenged ordinances, was entered on July 18, 1981. See Appendix, p. 23.

A notice of appeal to this Court was filed in the District Court for Ward County, which is possessed of the record, on October 6, 1981. See Appendix, p. 88. A supplementary notice of appeal to this Court was filed in the Supreme Court of North Dakota on October 6, 1981. See Appendix, p. 86.

This appeal is being docketed in this Court within ninety (90) days from the entry of judgment below. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(2).

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES

FIRST AMENDMENT,
UNITED STATES CONSTITUTION:

> Congress shall make no law . . . abridging the freedom of speech . . .

FOURTEENTH AMENDMENT,
UNITED STATES CONSTITUTION:

> Section One (1) . . . no state shall make or enforce any

law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law . . .

TITLE 28, UNITED STATES CODE, SECTION 1257 (2)
MINOT, NORTH DAKOTA, ORDINANCE 2336,
Section 2 (Nov. 5, 1979):

Section 15-5—*Adult Entertainment Center*: Notwithstanding anything in this zoning ordinance to the contrary, an adult entertainment center shall be permitted only in the M-2 District and in no other district, and then only if the center meets the following conditions:

(1) The center is located no closer than 1250 feet from a pre-existing church, school, or property zoned R1, R2, R3 or R4.

(2) The center excludes from its premises those persons less than 18 years of age.

(3) The center displays no signs visible from the exterior of the center, except for signs identifying the center as an adult book store or adult cinema or both.

(4) No materials depicted specified sexual activities or specified anatomical areas shall be visible from the exterior of the center . . .

MINOT, NORTH DAKOTA, ORDINANCE 2336,
Section 3 (Nov. 5, 1979):

Effective date. This ordinance shall become effective as of final passage and approval, but shall be applied retroactively as of October 1, 1979, so that a

non-conforming use which comes into existence on or after October 1, 1979, and before the second reading of this ordinance shall not be considered a prior valid non-conforming use.

In the event that the retroactive application of this ordinance provided for in Section 3 results in the taking of any person's vested rights in such a manner as to require under either the state or federal constitution that he be given just compensation for the taking, the city shall pay compensation to him in the constitutionally required amount in order to permit the retroactive application of this ordinance. The city council by resolution of a majority of its members may authorize the commencement of an eminent domain proceeding in order to condemn rights deemed to have been taken or it may authorize a confession of judgment in the proper amount.

(The complete ordinance is printed in the Appendix, p. 53).

MINOT, NORTH DAKOTA, ORDINANCE 2337, Section 2 (Nov. 5, 1979):

Section 6-54. *License Fee.* The license fee for a mechanical amusement device, other than device used on a regular basis to depict or display specified anatomical areas or specified sexual activities, shall be $25.00 a year for each device, provided that the owner of 10 or more such devices subject to licensing need pay only $250.00 a year for annual licenses for all of his machines.

(b) The license for a mechanical amusement device used on a regular basis to depict or display specified anatomical areas or specified sexual activities shall be $300.00 a machine per year, irrespective of a number of machines owned by any one person.

(The complete ordinance is printed in the Appendix, p. 55).

STATEMENT OF THE CASE

Appellants, Central Avenue News, Inc. and Don Gittleson challenge portions of a decision of the North Dakota Supreme Court upholding the constitutionality of two ordinances enacted by the City of Minot, North Dakota.

Appellant, Central Avenue News, Inc., ("Central") is a corporation which operates a bookstore in the City of Minot, North Dakota. Appellant, Don Gittleson is the controlling stockholder of the corporation. The bookstore operated by Central sells, to consenting adults, sexually explicit books and magazines which are presumptively protected speech under the First Amendment to the United States Constitution. Appellants also exhibit, to the public, motion picture films in private enclosed film booths.

Central's bookstore was the first, and so far is the only, adult bookstore to operate within the City of Minot, North Dakota. The bookstore was opened on October 8, 1979, as a commercial enterprise in an area zoned C-3 commercial.

Shortly after Central opened the bookstore, Appellee, the City of Minot (the "City"), enacted two ordinances designed to force the bookstore out of business. City of Minot Ordinance No. 2336, which purports to regulate zoning, and Ordinance No. 2337, which purports to regulate licensing, were passed on November 5, 1979, less than one month after the bookstore was opened. (See Appendix, p. 25).

Ordinance No. 2336, which amends the City's zoning laws, prohibits Central's bookstore from operating in any area other than a heavy industrial district. Further, under the Ordinance, the bookstore must be at least 1250 feet from a pre-existing church, school or residential district. Although Ordinance 2336 did not become effective until November 5, 1979, it contains a clause specifically providing

for retroactive application to October 1, 1979—seven days before Central's bookstore was opened. The usual "grandfather protection" afforded to a valid prior non-conforming use by zoning laws is omitted from the Ordinance. (See Appendix, p. 25).

Ordinance No. 2337, imposes license fees on mechanical amusement devices. The basic fee is $25.00 per device per year, but with a maximum fee of $250.00 a year for a license covering numerous machines under common ownership. The Ordinance creates an exception, however, for mechanical amusement devices used to exhibit sexually explicit material. An annual fee of $300.00 per machine is imposed upon such devices for each machine owned by the licensee. (See Appendix, p. 25).

Appellants first raised constitutional objections to the Ordinances during a civil suit filed by the City of Minot on September 9, 1980, in the District Court of Ward County. (See Appendix, p. 25). In this suit, the City sought to have the bookstore declared a "public nuisance," as defined by Section 42-01-06, N.D.C.C.; to have Central permanently enjoined from distributing obscene materials, pursuant to Section 42-02-01, N.D.C.C.; and to have the bookstore closed for one one year pursuant to Section 42-02-04, N.D.C.C. (See Appendix, p. 24).

On October 6, 1980, the North Dakota District Court upheld the constitutionality of the Ordinances and permanently enjoined Central from operating an adult entertainment center unless it complied with the Ordinances. (See Appendix, p. 25). Subsequently, on December 2, 1980, the trial court, on Central's motion, stayed the City from enforcing the Ordinances pending the outcome of this appeal.

The constitutional challenges to the two Ordinances was reiterated by Appellants before the North Dakota

Supreme Court. (See Appendix, p. 26). The North Dakota Supreme Court considered the constitutional claims and struck certain disclosure provisions within Ordinance No. 2337, but otherwise upheld the ordinances against constitutional challenges. This appeal is from the judgment entered by the North Dakota Supreme Court on July 18, 1981.

THE QUESTIONS ARE SUBSTANTIAL

A. *Introduction*

It is Appellant's contention that jurisdiction in this matter is proper. Review in its entirety is premised upon federal constitutional questions, each of which were specially set up or claimed and decided adversely to the Appellants throughout the state court proceedings. Either of the federal questions presented, if decided in Appellants' favor, would control the outcome of this case with respect to the Ordinance in question. Finally, each of the federal questions relied upon by Appellants is substantial. There are no prior decisions which establish that the state court was clearly right in its decisioin of the federal points, and conversely, there are recent federal court dcisions which indicate that the state court was clearly incorrect.

B. *A Substantial Question is Presented by the Imposition of a Licensing Fee on Speech Related Amusement Devices to Finance Enforcement of an Unlated Obscenity Act*

The City of Minot, North Dakota, establishes a licensing system which requires an annual payment of $300.00 per machine as a precondition to the operation of each and every mechanical amusement device depicting presumptively protected sexually explicit material within the City. Minot City Ordinance No. 2337 (hereinafter "Ordinance 2337"). Thus, if a business located in Minot owns twenty coin operated

devices exhibiting presumptively protected sexually explicit film-fare to the public, the business must pay an annual licensing fee of $6,000.00 to be entitled to operate the devices.

The City of Minot attempts to justify the fee imposed by Ordiniance No. 2337 as a financing regulation intended to defray not only the administrative cost of issuing the license, but also the anticipated costs of enforcing the North Dakota State Obscenity Control Act, Chapter 12.1-27, N.D.C.C. (See Appendix, p. 32).

There is no doubt that filmfare constitutes speech presumptively protected by the First Amendment. This protection encompasses the exhibition of motion picture films whether it be in a traditional theatre setting or by a mechanical amusement device such as is involved in the present case. *See Lo-Ji Sales, Inc.*, 442 U.S. 319 (1979); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Heller v. State of New York*, 413 U.S. 483 (1973.)

Further, this court has specifically held that a license fee levied and collected as a condition to the pursuit of activities whose enjoyment is guaranteed by the First Amendment constitutes a prior restraint. *Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105, 114 (1943). *See also Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

It follows that Ordinance 2337, by imposing a $300.00 fee on each amusement device depicting presumptively protected sexually explicit film-fare as a condition to operation of the device is thereby imposing a prior restraint on speech.

Appellants acknowledge that a prior restraint is not per se invalid and that the government may impose some financial burden incident to the exercise of First Amend-

ment rights. *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936); *Murdock v. Pennsylvania*, 319 U.S. 105, 113-114 (1943).

Any system of prior restraint on expression is, nonetheless, subject to a heavy presumption against its constitutional validity, and the Government must bear a heavy burden to justify its validity. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *New York Times v. United States*, 403 U.S. 713 (1971). This Court has determined that:

> The presumption against prior restraints is heavier and the degree of protection broader than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our laws: a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of free-wheeling cencorship are formidable.
> *Southeastern Promotions*, 420 U.S. at 558-59, 95 S. Ct. at 1246. *See also Near v. Minnesota*, 283 U.S. 697, 716 (1931); *New York Times v. United States*, 403 U.S. 713, 714 (1971); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1963).

To justify a prior restraint in the form of a fee on the exercise of First Amendment rights, the government must show that it is merely a "nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question." *Murdock*, 319 U.S. at 113-14. The fee must not, on the other hand, have the effect of compelling a person "to purchase, through a license fee or a license

tax, the privilege freely granted by the Constitution." *Murdock*, 319 U.S. at 114 (quoting *Blue Island v. Kozul*, 379 Ill. 511, 518, 41 N.E.2d 515). Further, the fees must not be a revenue tax. *Cox v. New Hampshire*, 312 U.S. 569 (1941).

Because freedom of speech has been held to be a fundamental right applicable to the states through the Due Process Clause of the Fourteenth Amendment, any burden imposed upon it by a state must be analyzed under the strict judicial scrutiny test. *Gitlow v. New York*, 268 U.S. 652, 666 (1925); *Fiske v. Kansas*, 274 U.S. 380 (1927); *Stromberg v. California*, 283 U.S. 359 (1931); *Schneider v. Irvington*, 308 U.S. 147 (1939).

Accordingly, insofar as Ordinance 2337 imposes a prior restraint on and burdens protected speech activities, it carries a heavy presumption against its constitutional validity and must be strictly scrutinized. This itself raises a question as to the validity of the challenged ordinance and the prior restraint it creates.

The federal courts have recognized the fundamental importance of the issue. In *Wendling v. City of Duluth*, 495 F.Supp. 1380 (D. Minn. 1980), the trial court addressed the constitutionality of a Duluth city licensing ordinance very similar to the ordinance challenged in the instant case. The city licensing ordinance challenged in *Wendling* conditioned operation of adult bookstore on the payment of an annual fee of $500.00 per store. The money collected from the license fee was admittedly used to finance the enforcement of the city's obscenity ordinance. Operators of adult bookstores filed a suit challenging the constitutionality of the ordinance on the grounds that it imposed a prior restraint on speech.

In its analysis, the District Court first articulated the

requirement that strict judicial scrutiny must be applied to any government imposition of fees which implicate fundamental rights. 495 F.Supp. at 1384. The court then proceded to formulate the issue: "whether the imposition of a license fee to finance enforcement of a separate obscenity ordinance can be considered the permissible policing of activities as prescribed in the *Murdock* case, or whether *Murdock* requires that the fee be no greater than is necessary to administer and enforce the licensing ordinance itself." The later view, concluded the court, is correct. 495 F.Supp. at 1384-85.

The *Wendling* court then noted that in Bayside *Enterprises, Inc. v. Carson*, 450 F.Supp 696 (M.D. Fla. 1978), the principles enunciated in *Murdock* were relied upon to strike down license fees of $500.00 and application fees up to $1,200.00 on adult entertainment facilities—fees which are actually less per business than those involved in the present case. The licensing authority in *Bayside* had failed to "demonstrate that the fees were necessary to cover the *reasonable costs of the licensing system and that the fees were used for no other purpose than to meet those costs.*" *Wendling*, 495 F.Supp. at 1385 quoting *Bayside* 450 F.Supp. at 705) (Emphasis added). "When this burden is not met," stated the court, "the fee must be invalidated as a prior restraint." *Wendling*, 495 F.Supp. at 1385.

The court in *Wendling* articulated a response to the license fee scheme in that case which is equally applicable to the scheme developed by the City of Minot in the instant case:

> An excessive license fee is viewed as a tax on the exercise of the fundamental rights guaranteed by the First Amendment and hence is a prior restraint. *Murdock v. Commonwealth of Pennsylvania*, 319 U.S. at 114, 63 S.Ct. at 875. Requiring plaintiffs to bear the

burden of the cost of enforcing the obscenity ordinance as a precondition to the exercise of their First Amendment rights constitutes such a prior restraint. Had the plaintiffs actually violated the obscenity ordinance in the past, the defendants could not use that as a ground to deny a license for an adult bookstore. *See Near v. Minnesota*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931); *Alexander v. City of St. Paul*, 303 Minn. 201, 227 NW2d 370 (1975). Nor should the possibility that plaintiffs may at some later date violate the obscenity ordinance subject them to an excessive license fee which presumes future obscenity violations.

Thus, [the ordinance] requiring the payment of $500 license fee in order to obtain a license for the operation of an adult bookstore is an unconstitutional prior restraint. 495 F.Supp at 1385.

The trial court reasoned that license fee imposed as a precondition to operate a bookstore must be related and the funds used solely for the administration and enforcement of the licensing ordinance. Since the fees were to be used to enforce and police a separate obscenity ordinance, the scheme was held unconstitutional. 495 F.Supp at 1385.

The issues as framed by the court in *Wendling* are the precise issues presented in the instant case. As in *Wendling*, the revenue collected from the Miinot license fee is admittedly intended to be used to finance not only the cost of issuing the license, but also the cost of enforcing a totally unrelated State Obscenity Control Act. As stated by the North Dakota Supreme Court in the instant case:

Licensing-fee schedules such as the one at issue here may be designed to defray not only the cost of issuing the license but also the reasonable cost of policing the activity being licensed. It is beyond question that the

police departments of North Dakota cities stand on the front line regarding enforcement of Chapter 12.1-27, N.D.C.C., the State Obscenity Control Act. It is further indisputable that with the presence in the city of amusement devices used for exhibiting sexually explicit films, the level of vigilance required for the enforcement of the Obscenity Control Act is substantially increased. Further, it does not defy reason to conclude that any expenses associated with increased enforcement should be borne by those who profit from the devices rather than being spread among the taxpayers or other owners of more innocuous amusement devices. These propositions constitute what Minot offers as its basis for the $300-per device license fee required by Ordinance No. 2337. Minot's chief of police testified at trial as to the anticipated level of law-enforcement activities that will be required, including both the anticipated cost of the routine policing of Central's amusement devices as well as the anticipated cost of proceeding on a suspected violation of the Obscenity Control Act . . . At a pay rate of nine dollars per hour this would amount to approximately $108 per year per amusement device to be expended by the City just to determine whether or not to proceed further on a suspected violation of the Obscenity Control Act. The chief testified that should the investigating officer suspect a violation, the time spent in preparation for court action would be approximately 12 hours per violation. This, of course, would mean another $108 dollars. The chief further testified that his projected figures did not include costs for clerical and other support services related to such enforcement. (See Appendix, pp. 31-32).

The dangers the court preceived in *Wendling*, are the same dangers which this court confronted in *Murdock*

when it determined that a person cannot be compelled to purchase, through a licensing fee, a right granted by the Constitution. *Murdock*, 319 U.S. at 114. To uphold the system that existed in Duluth, and which now exists in the City of Minot, is to sanction the proposition that a city or state may fund the enforcement of an anti-riot law by imposing an exorbitant fee as a precondition to a political speaker's right to speak. By any definition, such a system imposes a prior restraint on speech and limits the privilege to only those who can afford to purchase it at the high price being charged. "Free speech" is transformed into an expensive comodity and the death knoll is sounded for the First Amendment as we know it today. *See Murdock*. 319 U.S. at 114.

Deeply entrenched in our jurisprudence is the notion that federal courts are the primary guardians of rights stemming from the United States Constitution. *See e.g. Steffel v. Thompso* . 415 U.S. 452 (1974). Appellants are concerned, and urge this Honorable Court to be concerned, with the fact that a state court has issued an opinion which is oblivious to the mandates of a federal court eloquently addressing a federal constitutional issue. It is indeed difficult to imagine a more substantial federal question than that which now comes before this Court and which epitomizes the antithesis of our notion of federalism. Irrespective of the logic illustrated by the Court in *Wendling*, which Appellants assert is impeccable, the fact that a state court has chosen to ignore the unequivocal decision of a federal court with respect to constitutional law presents a federal question for jurisdictional purpose of ultimate dimension.

C. A Substantial Federal Question is Presented by a City Zoning Ordinanse Which Totally Excludes Adult Entertainment Centers From Commercial Areas and Permits Them to Locate Only in Heavy Industrial Zones and Then Only 1250 Feet From

From Pre-Existing Churches, Schools and Residential Zones.

Minot City Zoning Ordinance Number 2336 ("Ordinance No. 2336") totally bans adult bookstores from all commercial areas within the City of Minot, North Dakota. The ordinance restricts them to only heavy industrial zones, and within those zones, further restricts them to locations at least 1250 feet from pre-existing churches, schools and residential zones. There can be no doubt that by restricting the locations where adult bookstores can locate and totally banning them from all areas except heavy industrial zones of the City, Ordinance No. 2336 regulates expressive conduct that falls within the protection of the First Amendment. *See Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976).

Appellants do not dispute that a zoning ordinance can regulate activity protected by the First Amendment. This court has, in fact, upheld zoning regulations which do just that. *Young*, 427 U.S. 50, However, the zoning ordinance in question in *Young* imposed only a minimal burden on protected speech. "The market for this commodity is essentially unrestrained." 427 U.S. at 62. "The situation would be quite different," this Court added, "if the ordinance had the effect of suppressing or greatly restricting access to lawful speech." 427 U.S. at 72 n. 35.

Appellants submit that by totally banning adult entertainment facilities from all areas except heavy industrial, Ordinance No. 2336 imposes a burden on protected speech which in fact drastically restricts access to lawful speech. To the extent there is any doubt that *Young* was not intended to give cities unrestricted power to totally ban speech related adult entertainment facilities from all commercial areas of a city, as the City of Minot is attempting to do, such doubt is laid to rest by the recent case of *Schad v.*

Borough of Mount Ephraim, 101 S.Ct. 2176 (1981). This court in *Schad* interpreted *Young* as follows:

> The Court did not imply that a municipality could ban all adult theatres—much less all live entertainment or all nude dancing—from its commercial districts citywide. *Moreover, it was emphasized in that case that* the evidence presented to the Detroit Common Council indicated that the concentration of adult movie theaters in limited areas led to deterioration of surrounding neighborhoods, and it was concluded that *the city had justified the incidental burden on First Amendment interests* resulting from merely dispersing, but not excluding, adult theatres. 101 S.Ct. at 2184 (Emphasis added).

Schad highlights two aspects of the *Young* case which distinguish it from the instant case. Not only does Ordinance No. 2336 restrict access to speech to a much greater extent than did the ordinance in *Young*, but also, in contrast to the *Young* case, the City of Minot has provided no adequate justification for the Ordinance. Indeed, the City of Minot has completely failed to establish that the burdens placed upon constitutionally protected activities by the Ordinance serve any significant state interest. The North Dakota Supreme Court concluded that no justification for Ordinance No. 2336 is needed despite the fact that such conclusion totally ignores the basic requirement enunciated by the court in *Schad* that when a zoning law infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial government interest. 101 S.Ct. 2176 *See also, Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

The importance of the requirements that any regulation impinging upon freedom of speech be narrowly drawn and

adequately justified is evidenced by the attention such requirements have been given by this Court. In the landmark case of *Schneider v. Irvington*, 308 U.S. 147 (1939), for example, this Court acknowledged its duty to appraise the sufficiency of a justification for a regulation affecting speech:

> Mere legislative preferences or beliefs respecting matters of public convnience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of [First Amendment] rights. 308 U.S. at 161.

The Court in *Schneider* concluded that the antileafletting ordinances in question could not be justified by the city's interest in preventing litter. 308 U.S. at 162.

In *Village of Schamburg v. Citizens for a Better Environment*, 444 U.S. 620, 637 (1980), this court stressed the duty of courts not only to appraise the sufficiency of governmental interests but also to determine if such interests could be attained by less drastic means:

> The Village may serve its legitimate interests, but it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms.*Hynes v. Mayor of Oradell*, 425 U.S. a 620; *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978). 'Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone . . . . *NAACP v. Button*, 371 U.S. 415, 438 (1963). *See also*

Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977).

The recent case of *Schad* reaffirms the seriousness with which this court has always regarded the requirement that regulations impinging on speech be narrowly drawn and justified .Indeed, the entire opinion in *Schad* was framed around such requirement. This court in *Schad* noted each of the various justifications asserted by the city in an attempt to have the zoning ordinance upheld. One by one, they were rejected by this court as insufficient. For example, the city before this court in *Schad* suggested that the zoning ordinance could be justified as a reasonable time, place and manner restriction. The court responded:

> Thus, the initial question in determining the validity of the exclusion as a time, place and manner restriction is whether [the activity] is basically incompatible with the normal activity [in the commercial zones]. 101 S.Ct. at 2186.

The City, in the instant case, offered no evidence to establish that an adult bookstore was incompatible with the other commercial uses permitted. The bookstore is located within a commercial zone. (Appendix, p.) Bookstores, restaurants, bars and nightclubs, pool halls, theatres and other businesses are allowed in commercial zones in the City of Minot. Light and heavy industry enterprises are excluded. There is no justification for this exclusion and the opinion of the North Dakota Supreme Court has noted no state interest that would allow the exclusion. The presence of an adult bookstore within a commercial zone is compatible with other allowed uses.

The District Court's opinion, below, noted that the City's interest in attempting to preserve the quality of urban life

is one that must be accorded high respect when it upheld the zoning ordinance. However, there was no evidence of signs of deterioration caused by the bookstore, and no evidence of transients being attracted to the area was introduced. Here, as in *E. & B. Enterprises v. City of University Park*, 449 F.Supp. 695 (N.D. Texas 1977) where the neighborhood preservation justification is a mere mask to cover an attempt to run out of town an adult speech related business which some citizens do not approve, the effect on speech is significant, and the courts are required to act.

The City of Minot may contend that permitting the dissemination of adult materials in a commercial zone conflicts with its conception of that commercial zone. However, considering the diverse and numerous activities allowed, Appellants submit that this justification is patently insufficient. *See Shad*, 69 L.Ed.2d at 683.

It may also have been asserted that this exclusion was for reasons normally associated with zoning in commercial districts, that is, to avoid the problems such as parking, trash and police protection. Again, however, the City introduced no evidence for this justification and the Supreme Court of North Dakota did not identify it as a substantial state interest. Appellants maintain that these are not unique problems and the City could obliviate these problems, if any there are, by restrictions less intrusive in protected forms of expression. *See Schad*, 68 L.Ed.2d at 683-84.

In sum, the issue in the instant case is of the magnitude of those addressed by this court in*Young* and *Schad*. Whether Ordinance No. 2336 which unquestionably affects presumptively protected speech is sufficiently justified and narrowly drawn or whether it must be invalidated under the principles enunciated in *Schad* is an issue of the type which this court has traditionally and consistently con-

sidered to be the highest import. Accordingly. Appellants respectfully request that this court find the question to be so substantial as to require plenary consideration with briefs on the merits and oral argument for its resolution.

Respectfully submitted,

ARTHUR M. SCHWARTZ, P.C.
Arthur M. Schwartz
Counsel of Record
The Market Center
1650 Market Street
Denver, CO. 80202
(303) 893-2500

TIMOTHY J. AUSTIN
P.O. Box 785
Mandan, North Dakota 58554
(701) 663-9818
Attorney for Appellants

APPENDIX

EXHIBIT A

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

The City of Minot, a municipal corporation and political subdivision of the State of North Dakota, and State of North Dakota ex rel. Carroll Erickson,	)
Plaintiffs, Appellees, and Cross-Appellants	)
v.	
Central Avenue News, Inc., a foreign corporation, and Donald G. Gittelson,	)
Defendants, Appellants, and Cross-Appellees	)

Civil No. 9918

Filed July 18, 1981

Appeal from the District Court of Ward County, the Honorable Wallace D. Berning, Judge.

REMANDED.

Opinion of the Court by VandeWalle, Justice.

Nevin Van de Streek, of Eaton, Van de Streek & Ward, Minot, for plaintiffs, appellees, and cross-appellants.

Timothy J. Austin, Mandan, for defendants, appellants, and cross-appellees; Arthur M. Schwartz, Denver, Colorado, of counsel.

CITY OF MINOT v. CENTRAL AVENUE NEWS, INC.
VandeWalle, Justice.

Central Avenue News, Inc. ["Central"], and Donald G. Gittelson, Central's controlling stockholder, appeal from that portion of a judgment of the district court of Ward County which upheld the constitutionality of two ordinances enacted by the City of Minot ["Minot"]. Minot and the State of North Dakota ex rel. Carroll Erickson, chief of the Minot police department, cross-appeal from that portion of the same judgment which dismissed their attempt to have the operation by Central of an adult entertainment center declared a "public nuisance," as defined by Section 42-01-06, N.D.C.C.; to have Central permanently enjoined from distributing obscene materials, pursuant to Section 42-02-01, N.D.C.C.; and to have the premises housing the adult entertainment center closed for one year pursuant to Section 42-02-04, N.D.C.C. With the exception o fthat portion regarding the disclosure requirement of Ordinance No. 2336, we affirm the judgment of the district court but remand for a determination as to the obscenity or nonobscenity of certain materials:

On October 8, 1979, Central began operating a retail business in the downtown area of Minot for the purpose of selling sexually explicit books and magazines to adults. Central also installed booths in which, for a fee, the occupant may view sexually explicit motion pictures. At all times pertinent to this action the adult entertainment center has been situated in an area zoned by the City as "C-3, Commercial."

At some point prior to the adult entertainment center's opening, Minot officials became aware of Central's plan to open the center and began to consider solutions to problems which they believed would accompany the center's presence in the community. The city council, believing the existence of such an adult entertainment center in Minot would bring

about increased law-enforcement problems and have a negative impact on certain neighboring land uses, settled on two solutions: (1) to impose higher license fees on motion-picture booths used for viewing sexually explicit films than are charged for licensing other types of mechanical amusement devices; and (2) to prohibit adult entertainment centers such as the one operated by Central from doing business in certain areas in the city. To implement the first solution the city council amended Minot's Mechanical Amusement Devices license fee ordinance by enacting Ordinance No. 2337.[1] That ordinance requires a $300 annual license fee for each mechanical amusement device used to depict sexually explicit materials. To implement the second solution the Minot city council amended the City's zoning ordinance by enacting Ordinance No. 2336.[2] That ordinance allows for the operation of adult entertainment centers but restricts the location of such businesses.[3] Both Ordinances No. 2336 and No. 2337 were enacted on November 5, 1979. However, Ordinance No. 2336, which excludes operation of adult entertainment centers from areas of the city zoned as C-3, Commercial, expressly provides that its effect is to be applied retroactively to October 1, 1979. That date is approximately one week before Central began operating its adult entertainment center in a C-3, Commercial, area. Ordinance No. 2336 also provides for compensation to those affected by its retroactive application.

The city initiated an action seeking to restrain Central from engaging in the business of operating an adult entertainment center until it complied with the new ordinances. Central resisted Minot's efforts on the ground that the ordinances were unconstitutional. On October 6, 1980, the district court upheld the constitutionality of the ordinances and permanently enjoined Central from operating an adult entertainment center unless it complied with the ordinances. Subsequently, on December 2, 1980, the district court, on Central's motion, enjoined the City from enforcing

the ordinances pending the outcome of this appeal. In its October 6, 1980, judgment, the district court dismissed, for failure to state a claim upon which relief could be granted, the second count of Minot's complaint regarding application of the State's public nuisance laws to the operation of the adult entertainment center. This appeal and cross-appeal are from the district court's October 6, 1980, judgment.

Prior to setting forth and considering the particular issues raised in this appeal it is important to point out that Central is not contending that a governmental authority may not restrict the dissemination of presumptively protected (albeit sexually explicit) books and magazines through the use of zoning ordinance.[4] Rather, the essence of Central's objection to the ordinances in question is that they represent an unreasonable attempt by the City to exercise its right to regulate such materials.

The issues we now consider are these:

1. Whether or not Ordinance No. 2337, pertaining to license fees for mechanical amusement devices used to exhibit sexually explicit material, is unconstitutional.

2. Whether or not certain sections of Ordinance No. 2336, pertaining to zoning restrictions on adult entertainment centers, are unconstitutional.

3. Whether or not the City's attempt to regulate adult entertainment centers is pre-empted by the State's Obscenity Control Act.

4. Whether or not Chapters 42-01 and 42-02, N.D.C.C., regarding nuisances, may be used by governmental officials as a means to control obscenity.

Although Central does not challenge a governmental

authority's power to impose zoning restrictions and licensing requirements on adult entertainment centers such as the one operated by Central, we believe it would be beneficial to place that power into perspective before proceeding with consideration of the issues raised herein.

It has long been settled that municipalities may utilize land-use regulation in an effort to maintain order with respect to the quality of life as cities grow. In *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387, 47 S.Ct. 114, 118, 71 L.Ed. 303, 310 (1926), the Supreme Court pointed out that zoning regulations "must find their justification in some aspect of the police power, asserted for the public welfare." Further, the Court in *Euclid* set forth the standard for measuring the soundness of a zoning ordinance when it stated:

> "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." 272 U.S. at 388, 47 S.Ct. at 118, 71 L.Ed. at 311.

In North Dakota the validity of a city's attempt to exercise its police power is measured by the standard established in *Soderfelt v. City of Drayton*, 79 N.D. 742, 752, 59 N.W.2d 502, 507 (1953):

> "Statutory enactments and municipal ordinances having for their purpose the protection of the public health, safety, morals and public welfare are founded upon the police power inherent in the state. In passing upon the constitutionality of such statutes or ordinances the courts will not declare them unconstitutional and thus substitute their judgment for that of the legislative body charged with the primary duty and responsibility of determining the question where the

question is fairly debatable, that is, unless the statute or ordinances are clearly arbitrary and unreasonable having no substantial relation to the public health, safety, morals or public welfare."

In the instant case the city council of Minot is the legislative body charged with the primary duty and responsibility of determining the question of what protects the public health, safety, morals, and general welfare of the city. Section 40-47-01, N.D.C.C.[5] In fulfilling this duty, the body enjoys a general presumption of validity regarding the laws it enacts. *Horst v. Guy,* 219 N.W.2d 153 (N.D. 1974).

In *Young v. American Mini Theatres,, Inc.,* 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed. 310 (1976), the Supreme Court considered the constitutionality of a Detroit zoning ordinance which, except for the retroactive effect, was substantially similar to the zoning ordinance here involved. A plurality of the Court determined that while the First Amendment would not tolerate the total suppression of sexually explicit materials that have some arguably artistic value, it is unquestionable that society's interest in protecting such material is not nearly so keen as the interest in protecting political debate. The Court went on to observe:

"But few of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our desire." 427 U.S. at 70, 96 S.Ct. at 2452, 49 L. Ed. at 326.[6]

It therefore is clear that a city may enact zoning ordinances which classify and restrict commercial enterprises such as Central's adult entertainment center in ways different from other commercial enterprises notwithstanding the fact that

the stock in trade of such an adult entertainment center has peculiar constitutional protection.

Minot also has the power to enact ordinances which impose licensing requirements on the operation of amusement devices offered to the public by Central in its adult entertainment center. Section 40-05-01(26), N.D.C.C. However, it cannot be strongly urged that a licensing scheme directed at the dissemination of presumptively protected material is not a prior restraint on First Amendment rights. Further, while systems of prior restraint are not unconstitutional per se, they do stand before a court bearing a heavy presumption against their constitutionality. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975). A system of prior restraint "avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system." *Freedman v. Maryland*, 380 U.S. 51, 58, 85 S.Ct. 734, 739, 13 L.Ed.2d 649, 654 (1965). With the City's power to enact zoning and licensing ordinances in mind we now proceed to a consideration of the issues raised by Central.

LICENSING

Central raises two primary issues regarding Ordinance No. 2337, the licensing ordinance. Central argues that the fees imposed for licenses to operate the motion-picture booths are confiscatory in nature. Central's second complaint regarding Ordinance No. 2337 is that the official charged with executing the provisions of that ordinance is vested with too much discretion in that capacity and that this problem is aggravated by the ordinance's lack of procedural guarantees of prompt judicial review of the official's actions.

The First Amendment to the Federal Constitution provides:

"Congress shall make no law . . . abridging the freedom of speech, or of the press."

The fundamental right of free speech, which is protected from Federal action by the First Amendment, is afforded the same protection from State action through application of the Due Process Clause of the Fourteenth Amendment. *Grosjean v. American Press Co.*, 297 U.S. 233, 56, S.Ct. 444, 80 L.Ed. 660 (1936). A State may not ipose a charge for the enjoyment of a right granted by the Federal Constitution. *Murdock v. Pennsylvania*, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943). However, a governmental authority is not strictly forbidden from imposing some financial burden incidental to the exercise of First Amendment rights. *Grosjean, supra.* Licensing fees levied on practices or businesses the nature of which revolves around the exercise of First Amendment rights will withstand a constitutional attack only if they are nominal and imposed only as a regulatory measure to defray the expenses of policing the activities in question. *Murdock, supra.*

While Central concedes that the City may impose a licensing fee to defray the cost of policing the operation of amusement devices, it nevertheless maintains that the fee may not exceed the expenses for what it calls the "routine processing." Presumably, Central is referring to the bureaucratic mechanics involved in the actual issuance of a license and concludes that all expenses cease once a license has been issued. We are not convinced that the Supreme Court had in mind such a narrow construction of the concept of "policing" in *Murdock, supra.* Indeed, the closing language in *Murdock,* where the Court once again refers to the range of expenses which may be defrayed by the licensing fees, includes as permissible the cost of "protecting those on the streets and at home against the abuses of solicitors."[7] 319 U.S. at 116, 63 S.Ct. at 876, 87 L.Ed. at 1300, citing *Cox v.*

New Hampshire, 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049 (1941).

Central also argues that Minot has failed in its burden of proof that the $300-per-device fee is reasonable. The essence of Central's argument is that because Minot has not yet administered the licensing ordinance over an extended period of time it is impossible for the City to do anything more than speculate that $300 is a reasonable fee. Thus Central concludes that Minot's burden of proving the reasonableness of the fee has not and cannot be met. Central is correct in its assertion that where a city ordinance imposes a fee which threatens to interfere with the right guaranteed by the First Amendment, the burden of proving the reasonableness of that fee falls on the City. *NAACP v. Chester*, 256 F.Supp. 707 (E.D.Pa. 1966). However, Central does not point to, nor has our own research unearthed, authority to the effect that a city must, before implementing a licensing scheme with a fee, demonstrate what the administrative costs would have been in the past had the licensing scheme been in effect. Morover, we believe that Central's reliance upon *Bayside Enterprises, Inc. v. Carson*, 450 F.Supp. 696 (M.D.Fla. 1978), to support its contention is misplaced. In *Bayside*, the licensing fee in question was struck down not because it was speculative, but because the City of Jacksonville's projected costs of enforcing a newly enacted licensing ordinance for adult bookstores were unreasonable. Thus, regarding the licensing fee at issue in the instant case, we are left to determine only its reasonableness.

Testimony at trial by the Minot city manager indicates that the cost of issuing a license required by Ordinance No. 2337 would generally be the same as the cost for issuing any other license required by law. However, as has already been pointed out, licensing-fee schedules such as the one at issue here may be designed to defray not only the cost of

issuing the license but also the reasonable cost of policing the activity being licensed. It is beyond question that the police departments of North Dakota cities stand on the front line regarding enforcement of Chapter 12.1-27, N.D.C.C., the State Obscenity Control Act. It is further indisputable that with the presence in the city of amusement devices used for exhibiting sexually explicit films, the level of vigilance required for the enforcement of the Obscenity Control Act is substantially increased. Further, it does not defy reason to conclude that any expenses associated with increased enforcement should be borne by those who profit from the devices rather than being spread among the taxpayers or other owners of more innocuous amusement devices. These propositions constitute what Minot offers as its basis for the $300-per-device license fee required by Ordinance No. 2337. Minot's chief of police testified at trial as to the anticipated level of law-enforcement activities that will be required, including both the anticipated cost of the routine policing of Central's amusement devices as well as the anticipated cost of proceeding on a suspected violation of the Obscenity Control Act. Using one amusement device such as Central's movie booths as an example, the chief of police testified that even one visit per month by an officer could occupy an hour's time. The chief testified that a regular officer's pay rate is approximately eight to ten dollars per hour. At a pay rate of nine dollars per hour this would amount to approximately $108 per year per amusement device to be expended by the City just to determine whether or not to proceed further on a suspected violation of the Obscenity Control Act. The chief testified that should the investigating officer suspect a violation, the time spent in preparation for court action would be approximately 12 hours per violation. This, of course, would mean another $108 dollars. The chief further testified that his projected figures did not include costs for clerical and other support services related to such enforcement.

Central places strong emphasis on the fact that Minot was unable to demonstrate that since the bookstore has opened, additional personnel, equipment, and supplies have been required by the police department which are attributable to the presence of the adult entertainment center. However, the chief of police testified that during this time officers have been called away from other duties or have worked overtime on the increased enforcement duties brought about by the adult entertainment center's presence.

Our review of the record does not lead us to the conclusion that the projected costs associated with increased enforcement activities brought on by the particular amusement devices here involved are facially unreasonable. We believe $300 per year does not exceed what Minot could reasonably expect to expend while administering and policing the licensed activity of operating these amusement devices.

Central's next argument regarding Ordinance No. 2337 is twofold. Central argues that the licensing ordinance allows for too much discretion on the part of the official charged with the authority to issue a license and that the ordinance fails to provide for a speedy review of an alleged abuse of that discretion. Regarding the first element of this argument we believe that Central has presumed something which simply does not exist.

We do not believe that the cases relied upon by Central, as well as other cases dealing with the issue of discretion in a licensing scheme, support Central's contention that Ordinance No. 2337 provides for unfettered discretion on the part of the person responsible for issuing licenses. Those cases can be categorized in one of two ways: (1) the ordinance or regulation at issue expressly provided that the official or officials in whose power the issuance of the license rested could issue a license when they personally

believed the activity to be licensed was acceptable; or (2) the ordinance or regulation at issue simply provided, without more, that before the activity desired could be carried out a license must be obtained from a certain official or body of officials. See, e.g., *Southeastern Promotions, Ltd. v. Conrad, supra*; *Shuttlesworth v. Birmingham*, 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969); *Freedman v. Maryland, supra; Kunz v. New York*, 340 U.S. 290, 71 S.Ct. 312, 95 L.Ed. 280 (1951); *Bayside Enterprises, Inc. v. Carson, supra; Saia v. New York*, 334 U.S. 558, 68 S.Ct. 1148, 92 L.Ed. 1574 (1948). In all of these cases the issuance of the license was not a matter of routine; instead, it encompassed the consideration of facts, the exercise of judgment, and the formation of an opinion by the official or officials responsible for issuing the license in question. In the instant case, our examination of Ordinance No. 2337 leads us to conclude that not only does it not place too much discretion in the hands of the issuing authority; it places no discretion whatever in those hands.

Ordinance No. 2337 provides for three conditions to be met before a license will be issued: (1) $300 per amusement device must be paid to the City; (2) identification and location of each amusement device must be provided to the licensing authority; and (3) the license fee is payable on July 1 of each year. We believe that these three conditions constitute narrow, objective, and definite standards and preclude the exercise of discretion on the part of the licensing official. *Shuttlesworth v. Birmingham, supra.* We will not presume that the city official in Minot who has the responsibility of issuing the license will not obey the law, will not do what his duty requires him to do, and will not perform his duty correctly and in good faith. *Schell v. Callis*, 83 N.W.2d 422 (N.D. 1957); *Harding v. City of Dickinson*, 76 N.D. 71, 33 N.W.2d 626 (1948). If a license applicant believes that he has been denied a license because the licensing official has introduced an impermissible element

of discretion into the licensing process, the proper remedy would lie in an application for a writ of mandamus. Ordinance No. 2337 need not specifically point that out in order to be valid.

ZONING

Central raises several issues in claiming that elements of Ordinance No. 2336 are unconstitutional. First, Central argues that the disclosure requirements of that ordinance constitute an impermissible infringement on freedom of association and belief. Second, Central asserts that the distance requirements of the ordinance unconstitutionally suppress or restrict access to lawful speech. Finally, Central urges that even if the provisions in the ordinance survive a constitutional challenge, those provisions may not be applied retroactively.

Before discussing the issue raised by Central regardiing the ordinance's disclosure requirement we consider Central's assertion that the information sought by Minot through the disclosure provision could not conceivably be related to the concept of zoning. While we admit to having some difficulty understanding why this particular provision appears in the zoning ordinance rather than as a part of the licensing ordinance we are not disposed to strike down the zoning ordinance on that basis. As a general rule, courts apply the same rules of construction to municipal ordinances as they do to State statutes. 38 C.J.S. *Municipal Corporations* Sec. 442. Thus all ordinances and statutes relating to the same subject matter are to be construed together so as to harmonize them, if possible and give full force and effect to true legislative intent. *Dickinson Public School District No.* 1 *v. Scott*, 252 N.W.2d 216 (N.D. 1977). It is clear in the instant case that Ordinance No. 2336 and Ordinance No. 2337 are companion ordinances intended to alleviate the problems Minot officials believe would ac-

company the presence of adult entertainment centers in that city. It will be under this light that we consider the constitutionality of the disclosure requirement in Ordinance No. 2336.

Government requirements of disclosure of information by its citizens cannot be dealt with lightly. In this regard the Supreme Court has held that "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 64, 96 S.Ct. 612, 656, 46 L.Ed.2d 659, 713 (1976). In order that a governmental requirement of disclosure may withstand a constitutional challenge a substantial relationship must exist between the information sought to be disclosed and a significant governmental interest to be served by the disclosure. *Buckley, supra.* It is important to point out that the standard enunciated in *Buckley* came about as a result of the Supreme Court's concern over the effect compelled disclosure would have on individuals and groups involved in promoting unpopular political theories. However, we find appropriate the language in *NATCO Theatres, Inc. v. Ratner*, 463 F.Supp. 1124, 1132 (S.D.N.Y. 1979):

> "Such a strict standard need not necessarily apply when the type of association involved is one in which individuals have joined together for the purpose of engaging in profit making activity (as opposed to advocacy of ideas) and when the speech in question is that which was found by the plurality in *Young v. American Mini Theatres*, 427 U.S. 50, 70, 96 S.Ct. 2440, 2452, 49 L.Ed.2d 310 (1976), to be a 'type of expression [which] is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate.' "

It can hardly be argued that the operation of an "adult

entertainment center," as defined by Ordinance No. 2336, does not potentially pose more law-enforcement problems than the operation of a more traditional movie theater or bookstore. The very nature of the material found in an adult entertainment center may lie perilously close to, or indeed fall into, the category of material which is prohibited from distribution under the Obscenity Control Act. When the provisions of that Act are violated it is the duty of law-enforcement agencies to seek out and identify those responsible. We cannot say that if it is unreasonable for the City of Minot, in anticipation of possible violations, to attempt to identify those ultimately responsible rather than just the violator's clerks or agents. Thus some degree of disclosure is substantially related to the purpose of limiting purveyors of obscenity from operating within Minot. While we believe the purpose advanced by Minot to support its disclosure requirement is significant and further believe that disclosure is substantially related to the purpose, we are concerned that elements of the disclosure requirement at issue here exceed constitutionally permissible boundaries. It has long been a general proposition of First Amendment law that where there is a governmental infringement on the rights guaranteed by that Amendment "[T]he breadth of [that] legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton v. Tucker*, 364 U.S. 479, 488, 81 S.Ct. 247, 252, 5 L.Ed.2d 231, 237 (1960).

Under Ordinance No. 2336 owners and managers of adult entertainment centers are required to furnish to the chief of police ". . . such information as he reasonably may require with respect to their identities,. . ." We have already acknowledged that it is not unreasonable for the City of Minot to want to know who is responsible for the operation of adult entertainment centers. However, we believe that the term "identities" warrants specific standards such as

name and address. A person's "identity" may be established with reference to inumerable bits of information and because the establishment of identity under Ordinance No. 2336 is contingent upon the "reasonable" satisfaction of one individual with no measurable criteria to guide him, that element of the disclosure requirement effectively places the questions of whether or not a person may operate an adult entertainment center in the discretion of one person. This is a condition which cannot conceivably be labeled as the "less drastic" means for promoting an otherwise significant governmental interest. In light of this, that portion of the disclosure requirement relating to what the chief of police may reasonably require—other than fingerprints—with respect to identity must fail.

In addition to the general requirements that owners and managers of adult entertainment centers provide the chief of police identification information which he might reasonably require, Ordinance 2336 specifically requires that the owners and managers provide the chief of police with their fingerprints and "prior criminal records, if any." Arguably, law-enforcement agencies would be aided in their surveillance and enforcement activities regarding adult entertainment centers if they knew, for instance, which owners or managers of such businesses had been convicted for crimes related to obscenity. However, there clearly are some types of criminal convictions which in no way can be associated with the operation of a business in general or to adult entertainment centers in particular. In this respect we believe that the requirement of disclosing prior criminal records goes too far. A more narrowly drawn criminal-record-disclosure requirement focusing on particular crimes which are reasonably related to the governmental interest involved herein might survive constitutional scrutiny.

Central's next contention regarding the zoning ordi-

nance is that the distance limitations set forth in Ordinance No. 2336 have the effect of suppressing or greatly restricting access to lawful speech. We do not agree.[8] As was indicated by the Supreme Court in *Young v. American Mini Theatres, supra,* 427 U.S. at 71, 96 S.Ct. at 2452, 49 L.Ed.2d at 327, footnote 35, the pivotal question here does not focus on whether or not a certain distance is permissible, but rather on the question of whether or not the ordinance has the effect of suppressing, or greatly restricting, access to lawful speech.

Ordinance No. 2336 provides that an adult entertainment center may locate in Minot only on property zoned as M-2 and then only if the center is located no closer than 1,250 feet from any pre-existiing church, school, or property zoned R1, R2, R3, or R4. The district court's findings of fact show that the parties to this action stipulated to the admission into evidence of a map depicting where, within the area subject to Minot's zoning jurisdiction, Central could relocate the operation of its adult entertainment center. The court also found as fact that there is available, within such area, for purposes of operating an adult entertainment center, "land which is equivalent in area to a combination of many city blocks." We find this particularly significant in light of the fact that a central concern of the courts in other cases considering this issue was the effect of the distance limitation or, more precisely, the zoning space as it relates to the sellers, to the adult entertainment market. See *Young v. American Mini Theatres, supra; Genusa v. City of Peoria,* 475 F.Supp. 1199 (C.D.Ill. 1979); *Bayside Enterprises, Inc. v. Carson, supra.* The fact that there exists a substantial amount of area within Minot's zoning jurisdiction which is available for the purpose of operating an adult entertainment center leads us to conclude that Ordinance No. 2336 neither suppresses or greatly restricts access to the adult entertainment market.

Thus in *Schad v. Borough of Mount Ephraim*, ... U.S. ....., ... S.Ct. ....., ...L.Ed.2d ..... (June 1981), the United States Supreme Court reversed the conviction of the operators of an adult bookstore which contained coin-operated devices that displayed adult films as well as a coin-operated mechanism permitting a customer to watch a nude live dancer. The operators were convicted of violating a zoning ordinance that prohibited all live entertainment in the municipality. The United States Supreme Court noted that as the ordinance had been construed by the New Jersey courts it prohibited all live entertainment, and observed:

> "By excluding live entertainment throughout the Borough, the Mount Ephraim ordinance prohibits a wide range of expression that has long been held to be within the protections of the First and Fourteenth Amendment. Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee. [Citations omitted.]" .....U.S. at ....., ...S.Ct. at ....., ...L. Ed.2d at .....

The Court further noted that the case was not controlled by *Young v. American Mini Theatres, Inc., supra*, because in that case the restriction did not affect the number of adult movie theatres that could operate in the city; rather, it merely dispersed them. The Court further observed that in *Young v. American Mini Theatres* it did not imply that a municipality could ban all adult theaters—much less all live entertainment or all nude dancing—from its commercial districts citywide:

> "To be reasonable, time, place and manner restric-

> tions not only must serve significant state interests but also must leave open adequate alternative channels of communication. [Citations omitted.] Here, the Borough totally excludes all live entertainment, including nonobscene nude dancing that is otherwise protected by the First Amendment. As we have observed, *Young v. American Mini Theatres, Inc., supra,* did not purport to approve the total exclusion from the city of theaters showing adult, but not obscene, materials. It was carefully noted in that case that the number of regulated establishments was not limited and that [t]he situation would be quite different if the ordinance had the effect of supressing, or greatly restricting access to, lawful speech." ' ..... U.S. at ....., ... S.Ct. at ....., ... L.Ed.2d at .....

Here, the City of Minot has not attempted to restrict all forms of live entertainment or all adult bookstores from the areas zoned by the City of Minot. As we have already noted, there are many areas available in the zoned areas in which adult bookstores may operate. For these reasons we conclude that this matter is governed by *Young v. American Mini Theatres, Inc.*, rather than by the recent decision of *Schad v. Borough of Mount Ephraim.*

Central also asserts that it may not, through Ordinance No. 2336, be deprived of previously vested property rights. Central places substantial reliance for this proposition on footnote 35 of *Young v. American Mini Theatres, supra,* 427 U.S. at 71, 96 S. Ct. at 2452, 49 E.Ed. 2d at 327, wherein the plurality stated:

> "The situation would be quite different if the ordinance had the effect of suppressing or greatly restricting access to lawful speech. Here, however, the district court specifically found that 'the ordinances do not

affect the operations of existing establishments but only the location of new ones.' "

It is on the second sentence of this quoted portion that Central, we believe, misplaces its reliance. That sentence, if for no other reason than it is found in a footnote rather than in the opinion proper, did not represent an issue upon which the approval bestowed by the Court on the Detroit zoning ordinance in that case turned. We believe the emphasis on the last sentence should fall on the word "operations." The physical location of an adult entertainment center was of importance to the Court only to the extent of its effect on the operation of that center as it relates to access to the adult entertainment market by buyers and sellers. The second sentence of the quoted portion simply cannot be construed to stand for the proposition that a zoning ordinance such as the one in the instant case never may be applied retroactively.

Ordinance No. 2336 contains a provision that, should the retroactive application of the ordinance result in the type of taking of vested property rights in a manner requiring that the divested owner be compensated, the city council may commence eminent-domain proceedings or authorize a confession of judgment to compensate the divested owner. This type of provision in a zoning ordinance is not altogether unusual but has been subject to attack. Assaults on such a zoning-with-compensation ordinance may be divided into three general categories. See 41 A.L.R. 3d 636. First, some of those opposing such an ordinance have claimed that the municipality did not have authority to enact the ordinance. Second, in some cases attackers have asserted that the ordinance involved the taking of property for a private, rather than public, use. And, finally, in some instances claims have been made that the ordinance was unreasonable. Central has not specifically asserted any

of these claims regarding the zoning-with-compensation element of Ordinance No. 2336, but prefers to allege simply that it may not be deprived of its vested property rights by the retroactive application of that ordinance.[9]

The power of eminent domain is inherent in the State, but a municipality does not hold such power unless it has been expressly granted to it by the Legislature or it exists by necessary implication. *City of Fargo, Cass County v. Harwood Township,* 256 N.W.2d 699 (N.D. 1977). In this State municipalities such as Minot have been granted the power of eminent domain through Section 40-05.1-6(1), N.D.C.C.

As noted earlier, Minot has the authority to enact land-use regulations without a corresponding obligation to compensate a property owner for the restrictions placed on the use of his property. *Euclid v. Ambler Co., supra;* Section 40-05.1-06(11), N.D.C.C. We see the zoning-with-compensation element of Ordinance No. 2336 as a coupling of Minot's zoning power with its power of eminent domain derived from Section 40-05.1-6(1), N.D.C.C. We know of no prohibition against the enactment of an ordinance which reflects the combination of these two powers and is designed to be invoked in order to alleviate a particularly onerous burden which may befall a property owner who is forced to relocate as a result of the retroactive application of a legitimate exercise of a municipality's land-use-regulation authority.

Central's only specific allegation with respect to what it regards as the weakness of the zoning-with-compensation provision in Ordinance No. 2236 is that such a scheme "grants the city council unlimited discretion to commence an eminent domain proceeding and enforce its retroactive

application." Central contends that this "unbridled" discretion in some way violates the Constitution. In this regard we point out that in this State it is well settled that the power of eminent domain includes discretion to determine the necessity of exercising the power and the location of the site to be taken. *Northern States Power Co. v. Effertz*, 94 N.W.2d 288 (N.D. 1958).

PRE-EMPTION

Central next asserts that even if the two ordinances at issue here are found by this court to be constitutionally sound, Minot is precluded from enacting or enforcing such ordinances because of Section 12.1-27.1-12, N.D.C.C. At the time Minot enacted the ordinances, that Section, which is entitled "State pre-emption of local laws regulating obscenity," provided:

> "This chapter shall be applicable and uniform throughout the state, and no political subdivision shall enact new, or enforce existing, ordinances or resolutions regulating or prohibiting the dissemination of obscene materials, or controlling obscene performances, except ordinances authorized by section 5-02-09."[10]

Central relies on *City of Grafton v. Four G's, Inc.*, 252 N.W.2d 879 (N.D. 1977), to support its proposition that the pre emption statute at Section 12.1-27-1.12 prohibits Minot from enacting the zoning and licensing ordinances.

In *Four G's*, we considered a bar owner's conviction under a Grafton ordinance which prohibited liquor licenseholders from permitting certain acts and conduct of a sexual nature, whether or not they were obscene, to be displayed in that city's licensed liquor establishments. We determined that the enactment of such an ordinance was prohibited in light of the pre-emption characteristics within the State's

Obscenity Control Act. The Grafton ordinance had been enacted by the City in reliance on the authority vested in it through Section 5-02-09, N.D.C.C. We subsequently decided that—because of the rule in Section 1-02-07, N.D.C.C., that a specific statute controls a general statute—the general pre-emption statute, Section 12.1-27.1-12, would not prevail over the specific grant of authority in Section 5-02-09 if only these two statutes were involved.[11] However, we concluded that our consideration could not be limited to these two statutes because of the existence of Section 12.1-27.1-01(3).[12] At that point we were called upon to determine whether Section 12.1-27.1-01(3) repealed by implication the authority Section 5-02-09 would otherwise give local governing bodies to control the type of conduct in liquor establishments which the City of Grafton sought to control through its ordinance. Our examination of the legislative history of Section 12.1-27.1-01(3) revealed that the Legislature relied almost exclusively on *California v. La Rue*, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d. 342 (1972), as its basis for enacting Section 12.1-27.1-01(3). In *California v. LaRue*, the Supreme Court held that the Twenty-first Amendment provides States with an extra degree of authority to control conduct of a sexual nature, whether or not it is obscene, in their licensed liquor establishments, even though, because of the First Amendment, that same behavior might be immune from such special classification if it were to take place outside those establishments. Thus, in *Four G's*, we concluded that the legislative history of Section 12.1-27.1-01(3) clearly reflected the Legislature's intention to enact a law which would specifically prohibit local governing bodies from not only regulating or prohibiting obscenity in their licensed liquor establishments, but, because of the Legislature's reliance on *California v. LaRue, supra*, also from "*attempting* to control obscenity" under Section 5-02-09. [Emphasis added.] *Four G's, supra*, 252 N.W.2d at 883. Therefore, as a result of *Four G's*, a

municipality was precluded from enacting ordinances which attempted to control entertainment of a sexual nature in liquor establishments even where such entertainment may not be obscene.[13]

Our determination of the pre-emption issue raised by Central in the instant case differs from the issue facing us in *Four G's*, in that, unlike our consideration in *Four G's* of Section 12.1-27.1-01(3) regarding licensed liquor establishments, we are not required here to consider a specific section in the Obscenity Control Act regarding the prohibition on municipalities' attempt to control adult entertainment centers. Indeed, the situation confronting us in this case is much more akin to the obscenity pre-emption issue in *Midtown Palace, Inc. v. City of Omaha*, 193 Neb. 785, 229 N.W. 2d 56 (1975), which, in *Four G's*, we determined, because of the absence in *Midtown Palace* of a Section 12.1-27.1-01 (3)-type statute, was not applicable to our consideration.

In *Midtown Palace* a liquor license holder sought a declaratory judgment that a city ordinance, an ordinance substantially similar to the ordinance at issue in *Four G's, supra*, was void because of the State's obscenity pre-emption statute. [14] The court concluded that nudity and obscenity are not synonymous, in that nudity does not become an obscene performance unless that performance constitutes obscenity under the standards of *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). The Nebraska court went on to point out that the ordinance in question did not declare nudity to be obscene nor delineate it as a crime. Further, the court observed that the ordinance merely attempted to control nudity as a technique in selling liquor and that this was a legitimate objective under *California v. LaRue, supra*.

We believe that the Minot ordinances at issue here were not enacted in violation of Section 12.1-27.1-12. This

belief is founded upon an analysis similar to the one employed by the court in *Midtown Palace, supra.* Sexually explicit material is not without constitutional protection unless it is of the nature described in Section 12.1-27.1-01 (04), N.D.C.C. (i.e., obscene material). Minot's zoning and licensing ordinances do not attempt to define sexually explicit material as obscene nor do they delineate its sale as a crime. The ordinances attempt to control the manner in which sexually explicit material is disseminated and this, as has been earlier pointed out, is a legitimate objective. *Young v. American Mini Theatres, supra.* In light of this, we conclude that Ordinance No. 2336 and Ordinance No. 2337 were not enacted in violation of Section 12.1-27.1-12, N.D.C.C.[15]

NUISANCE

In count No. 2 of the complaint in the action which precipitated this appeal, the Minot chief of police, as relator under the State nuisance laws, alleges that Central uses its adult entertainment center to display and sell obscene material and therefore the adult entertainment center constitutes a nuisance in general under Section 42-01-01, N.D.C.C.,[16] and particularly a public nuisance under Section 42-01-06, N.D.C.C.[17] In his prayer for relief, Chief Erickson asked the trial court:

> "5.
>
> "For a permanent injunction against all of the defendants, limited as required by considerations of the 1st and 14th Amendments to the United States Constitution and Section 9 of the State of North Dakota Constitution, closing the premises for a period of 1 year pursuant to NDCC 42-02-04, subject to property owner's rights under NDCC 42-02-06."[18]

In its judgment, dated October 6, 1980, the district court, having relied in its memorandum opinion on the

First Amendment doctrine of prior restraint, dismissed the second count of the complaint because it failed to state a claim upon which relief may be granted. In the cross-appeal brought by Minot and Chief Erickson we are asked to decide whether or not the dissemination of obscene material is an activity susceptible of regulation under Title 42, *Nuisances*, N.D.C.C.

At the outset of our consideration of this issue we point out that an action to restrain a nuisance is an equitable proceeding and a court of equity has jurisdiction to restrain a nuisance even though the act sought to be restrained is criminal and punishable under this State's penal laws. *State v. Hooker*, 87 N.W.2d 337 (N.D. 1957). Thus the fact that dissemination of obscene material in this State is punishable under Section 12.1-27.1-01, N.D.C.C., is not an obstacle in our consideration of the present issue. In addition, we are aware of no requirement that States are obligated to enact special statutes establishing procedures exclusively for use in cases which involve First Amendment rights. This is pointed out to illustrate that certain action taken by the North Dakota Legislature subsequent to the district court's judgment in this action has no bearing on our consideration of this issue.[19]

The question of whether or not the dissemination of material which has been found to be obscene constitutes a nuisance under Section 42-01-01, N.D.C.C., must be answered before we determine whether or not such dissemination may be enjoined under Section 42-02-02, N.D.C.C., or made the subject of abatement under Section 42-02-04, N.D.C.C.

We believe that the root of the answer to the question of whether or not the dissemination of obscene material is a nuisance is embedded in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973). In *Paris*,

the Supreme Court determined that States have a legitimate interest in regulating commerce in obscene material and its exhibition in places of public accommodation, including adult entertainment centers. A remark made by the Court may be related directly to Section 42-01-01(2), N.D.C.C.:

> "The States have the power to make a morally neutral judgment that public exhibition of obscene material, or commerce in such material, has a tendency to injury the community as a whole, to endanger the public safety, or to jeopardize, in Mr. Chief Justice Warren's words, the States' 'right . . . to maintain a decent society.' [Citation omitted.]" 413 U.S. at 69, 93 S.Ct. at 2641, 37 L.Ed.2d at 464.

In *Paris*, the Court expressly approved Georgia case law which upheld civil injunctions regarding the exhibition of obscene material. Among the cases considered was *Evans Theatre Corp. v. Slaton*, 227 Ga. 377, 18 S.E.2d 712 (1971), wherein the Supreme Court of Georgia, recognizing that the State has an interest in the welfare, peace, and good order of its citizens and communities, concluded that the exhibition of obscene material to consenting adults in an adult theater is contrary to the standards of decency and propriety of the community as a whole and may be enjoined as a nuisance. The Supreme Court of the United States in *Paris, supra,* approved of the Georgia procedure and elaborated:

> "While this procedure is civil in nature, and does not directly involve the state criminal statute proscribing exhibition of obscene material, the Georgia case law permitting civil injunction does adopt the definition of 'obscene materials' used by the criminal statute." 413 U.S. at 54, 93 S.Ct. at 2633, 37 L.Ed.2d at 455.

The Supreme Court went on to point out that on the same

day it was deciding *Paris* it had decided *Miller v. California, supra*, wherein a new standard for determining obscenity was set forth. The Court remanded the obscenity issue in *Paris* to be reconsidered in light of *Miller*. However, the Court stressed that the remand was not to be taken as a sign it disapproved of the Georgia procedure:

> "This is not to be read as disapproval of the Georgia civil procedure employed in this case, assuming the use of a constitutionally acceptable standard for determining what is protected by the First Amendment. On the contrary, such a procedure provides an exhibitor or purveyor of materials the best possible notice, prior to any criminal indictments, as to whether the materials are unprotected by the First Amendment and subject to State regulation. [Citation omitted.] Here, Georgia imposed no restraint on the exhibition of the films involved in this case until after a full adversary proceeding and a final judicial determination by the Georgia Supreme Court that the materials were constitutionally unprotected. Thus the standards of [prior United States Supreme Court decisions] were met." 413 U.S. at 55, 93 S.Ct. at 2634, 37 L.Ed.2d at 455.

Thus, provided adequate constitutional safeguards are present, there exists no principle of law which prohibits States from regulating, through the use of their nuisance laws, the dissemination of obscene material.

The same conclusion we reach today regarding the regulation of obscene material through the application of nuisance laws was reached by the Supreme Court of California in *People ex rel. Busch v. Projection Room Theater*, 130 Cal.Rptr. 328, 550 P.2d 600 (1976). In *Busch*, the court considered the challenge raised by the defendants that the use of public-nuisance statutes to enjoin or otherwise abate

the exhibition of films and magazines violates the constitutional principle against prior restraint of presumptively protected materials. The California court noted, as we have earlier in this opinion, that prior restraints are not unconstitutional per se, and that they may be constitutionally sound if they are brought about with the use of procedural safeguards which exist to shield against the dangers of a censorship system. *Southeastern Promotions, Ltd. v. Conrad, supra.* In *Southeastern*, the Supreme Court identified these safeguards:

> "First, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. Second, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. Third, a prompt final judicial determination must be assured." 420 U.S. at 560, 95 S.Ct. at 1247, 43 L.Ed.2d at 460.

As did the California Supreme Court in *Busch, supra*, we have reviewed the forms of relief sought by Minot under this State's nuisance laws in order to determine whether or not they may be applied to regulate obscene material in such a way as to accommodate the safeguards enumerated above. We are satisfied that, as applied to specific materials, under the procedures and remedies available within this State's nuisance laws, a determination of obscenity may be made and the specific material adjudged obscene may be the subject of an injunction prohibiting its further dissemination. However, we are unable to arrive at the same conclusion where the form of relief sought is, pursuant to Section 42-02-04, N.D.C.C., the closing for one year of the establishment from which the particular obscene items were disseminated. We believe that such a remedy would constitute an impermissible prior restraint upon freedom of speech. Closing for a year of an establishment to prevent

the dissemination of material therein which has not been adjudged to be obscene flies squarely in the face of the constitutional safeguards necessary to support a valid prior restraint. A determination that because one or two items being disseminated from an establishment are obscene, all of the items within the establishment may be prohibited from being disseminated, cannot be reconciled with the long-standing constitutional safeguards surrounding free speech. See *Near v. Minnesota*, 283 U.S. 697, 51 S. Ct. 625, 75 L.Ed. 1357 (1931).

The record in this case indicates that Minot and Chief Erickson sought, through their complaint and prayer for relief, to have the trial court determine: (1) that the dissemination of specific material which was before the trial court constituted a nuisance and that Central should be enjoined from distributing that material; and (2) that upon such a determination, Central's adult entertainment center should be closed for one year under Section 42-02-04, N.D.C.C. We have determined that, provided certain constitutional safeguards are present, it is permissible for a trial court in this State to make the determination sought regarding specific material. We now also conclude that such a determination alone will not constitutionally support the closing for one year of the establishment from which the material is dispensed unless other circumstances justifying a one-year closing exist. The trial court apparently believed that this latter issue represented Minot and Erickson's ultimate goal and was the one which warranted a special ruling. Thus in its memorandum opinion, while generally recognizing the case law which supports the use of nuisance laws to determine the existence of and enjoin the distribution of specific obscene materials, the trial court proceeded to its conclusion that Section 42-02-04, N.D.C.C., could not be used to close the adult entertainment center:

". . . none of the material involved in this present case

has been declarel to be obscene pursuant to North Dakota law, nor was the purpose of this present case to do so."

In light of our conclusion that this State's nuisance laws may be used to determine and enjoin the distribution of specific obscene material, we believe that the trial court should have considered the particular items before it and made a ruling as to their status as obscene or not obscene material. Therefore, we remand that issue to the trial court for such a determination.

In all other respects, except for our determination regarding the permissible scope of the disclosure requirement in Ordinance No. 2337, which is severable from the remaining provisions of the ordinance, the judgment of the trial court upholding the ordinances is affirmed.

Harold W. VandeWalle—Facsimile
Vernon R. Pederson—Facsimile
Undecipherable name
Undecipherable name
Undecipherable name

Footnotes to MINOT v. CENTRAL AVENUE NEWS, Civil No. 9918, pp. 25, 26, 28, 30, 39, 43, 44, 45, 46, 47, 48.

[1]Ordinance No. 2337 states:

"AN ORDINANCE TO AMEND SECTIONS 6-42 AND 6-54 OF THE CODE OF ORDINANCES PERTAINING TO LICENSE FEES FOR MECHANICAL AMUSEMENT DEVICES

"BE IT ENACTED BY THE CITY COUNCIL OF THE CITY OF MINOT:

"1. *Legislative intent and purpose.*

"The purpose of this ordinance is to recognize and to provide for

the fact that the operation of mechanical amusement devices which depict or display specified sexual activities or specified anatomical areas results in increased enforcement problems for the city and additional expense to the city that justifies a higher license fee for these devices than for other mechanical amusement devices. This follows because it is not immediately possible to distinguish between constitutionally protected non-obscene depicitions or portrayals of explicit sexual conduct, on one hand, from non-constitutionally protected obscene portrayals of sexual conduct on the other hand. This necessitates greater police vigilance to assure that the lawful business of displaying non-obscene portrayals or depictions of sexual conduct is not used inadvertently or by design as the means of unlawfully displaying or depicting obscenity. In order to recoup some of the costs thus imposed on the city it is appropriate that there be imposed on the persons who profit from such devices some of the costs of insuring that the devices are used only lawfully.

"2. Section 6-42 of the Code of Ordinances is amended to read as follows:

"Section 6-42. *Definition.*

"A 'mechanical amusement device' is a machine which, upon the insertion of a coin or the payment of consideration, operates or may be operated for use as a game, contest, or amusement of any description, or which depicts, displays, or projects directly or indirectly pictures, photographs or other visual images.

"Section 6-54 of the Code of Ordinances is hereby amended to read as follows:

"Section 6-54. *License Fees.*

"The license fee for a mechanical amusement device, other than a device used on a regular basis to depict or display specified anatomical areas or specified sexual activities, shall be $25.00 a year for each device, provided that the owner of 10 or more such devices subject to licensing need pay only $250.00 a year for annual licenses for all of his machines.
"(b) The license for a mechanical amusement device used on a regular basis to depict or display specified anatomical areas or specified sexual activities shall be $300.00 a machine per year, irrespective of a number of machines owned by any one person.

"(c) The terms 'specified anatomical areas' and 'specified sexual activities' as used herein are defined in section 2-1 of the zoning ordinance, ordinance number 1149, as amended.

"(d) The owner of the mechanical amusement device shall furnish a complete list of all devices owned by him subject to licensing with an indication thereon of the location of each machine. The information will be provided as part of the application for a license or licenses.

"(e) The fees provided for herein shall be payable on July 1st of each year, and prorated on a daily basis if a license becomes effective at any time other than July 1.

"4. This ordinance shall become effective upon passage and approval. Existing licenses shall remain in effect until they expire by their own terms or upon July 1, 1980, whichever first occurs, except that an increase of license fees with respect to any existing licenses or class of licenses which is accomplished by this ordinance it shall become effective upon the effective date of this ordinance, subject to proration as provided by in subsection 6-54 (e).

"5. *Severability*. The provisions in the ordinance are severable and if any of the provisions, sentences, clauses or paragraphs shall be held unconstitutional, contrary to statute, exceeding the authority of the city or otherwise illegal or inoperative by any court of competent jurisdiction, the decision of such court shall not affect or impair any of the remaining provisions, unless the court should conclude that the partial invalidation would frustrate the intent of this ordinance."

[2]Ordinance No. 2336 reads:

"AN ORDINANCE TO AMEND THE ZONING ORDINANCE, ORDINANCE NUMBER 1149, AS AMENDED, IN ORDER TO DEFINE ADULT ENTERTAINMENT CENTER AND OTHER RELATED TERMS AND TO PROVIDE THAT ADULT ENTERTAINMENT CENTERS BE RESTRICTED TO LOCATIONS WITHIN THE 'M-2' HEAVY INDUSTRIAL ZONE UNDER CERTAIN CONDITIONS AND LIMITATIONS.

"BE IT ENACTED BY THE CITY COUNCIL OF THE CITY OF MINOT:

"1. Section 2.1 of the Zoning Ordinance, ordinance number 1149, as amended, is hereby amended by the addition thereto of the following definitions:

"(1.1) *Adult Bookstore*: An enclosed building having as a substantial or significant portion of its stock in trade, books, magazines, or other periodicals which are distinguished or characterized by their emphasis on matter depicting or describing specified sexual activities or specified anatomical areas.

"(1.2) *Adult Cinema*: An enclosed building used on a regular basis for presenting pictorial materials or other visual images by way of direct or indirect projection, which materials are distinguished or characterized by an emphasis on the depiction of specified sexual activities or specified anatomical areas, for observation by patrons therein in return for the payment of a consideration, irrespective of the number of patrons who may be able to view the presentation at one time.

"(1.3) *Adult Entertainment Center*: An adult book store or adult cinema, or both.

"(45.1) *Specified Anatomical Areas*:

"(a) Less than completely and opaquely covered:

"(1) Human genitals, pubic region;

"(2) Buttock;

"(3)Female breast below a point immediately above the top of the areola; and

"(b) Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

"(45.2) *Specified Sexual Activities*:

"(a) Human genitals in a state of sexual stimulations or arousal;

"(b) Acts of human masturbation, sexual intercourse, or sodomy;

"(c) Fondling of human genitals, pubic region, buttock or female breast.

"2. Chapter 15 of the Zoning Ordinance is amended by adding thereto the following section 15-5.

"Section 15-5. *Adult Entertainment Center*: Notwithstanding anything in this zoning ordinance to the contrary, an adult entertainment center shall be permitted only in the M-2 District and in no other district, and then only if the center meets the following conditions:

"(1) The center is located no closer than 1250 feet from any preexisting church, school, or property zoned R1, R2, R3, or R4.

"(2) The center excludes from its premises those persons less than 18 years of age.

"(3) The center displays no signs visible from the exterior of the center, except for signs identifying the center as an adult book store or adult cinenma or both.

"(4) No materials depicted specified sexual activities or specified anatomical areas shall be visible from the exterior of the center.

"(5) The manager and the owners of the center are registered with the Chief of Police and have provided him with such information as he reasonably may require with respect to their identities, including finger prints, and prior criminal records, if any.

"(6) The business premises of the center which are generally open to its patrons are open equally at the same time without charge to members of the city police force who may wish to enter thereon

provided the entry is in the course of the discharge of the policeman's duties.

"3. *Effective date.* This ordinance shall become effective as of final passage and approval, but shall be applied retroactively as of October 1, 1979, so that a non-conforming use which comes into existence on or after October 1, 1979, and before the second reading of this ordinance shall not be considered a prior valid non-conforming use.

"4. 'In the event that the retroactive application of this ordinance provided for in Section 3 results in the taking of any person's vested rights in such a manner as to require under either the state or federal constitution that he be given just compensation for the taking, the city shall pay compensation to him in the constituionally required amount in order to permit the retroactive application of this ordinance. The city council by resolution of a majority of its members may authorize the commencement of an eminent domain proceeding in order to condemn rights deemed to have been taken or it may authorize a confession of judgment in the proper amount.'

"5. *Severability.* The provisions in the ordinance are severable and if any of the provisions, sentences, clauses or paragraphs shall be held unconstitutional, contrary to statute, exceeding the authority of the city or otherwise illegal or inoperative by any court of competent jurisdiction, the decision of such court shall not affect or impair any of the remaining provisions, unless the court should conclude that the partial invalidation would frustrate the intent of this ordinance."

[3]Central does not argue that its adult entertainment center is not an "adult entertainment cener," as defined in Ordinance No. 2336.

[4]Indeed, in oral agrument before this court, counsel for Central stated: "Under the zoning regulations, I think, Your Honor, that we have a valid zoning law, with this law, except for its retroactive application and except for its disclosure of prior criminal records, I think it goes too far." In addition, Central acknowledges the right of governmental authorities to zone adult entertainment centers, and cities *Young v. American Mini Theatres*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), for this proposition.

[5]Section 40-47-01, N.D.C.C., states:

> *"Cities may zone—Application of regulations.* For the purpose of promoting health, safety, morals, or the general welfare of the community, the governing body of any city may, subject to the provisions of chapter 54-21.3, regulate and restrict the height, number of stories, and the size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and

use of buildings, structures, and land for trade, industry, residence, or other purposes. Such regulations may provide that a board of adjustment may determine and vary the application of the regulations in harmony with their general purpose and intent and in accordance with general or specific rules therein contained."

[6]In a concurring opinion, Justice Powell declined to assign a lesser degree of interest to the First Amendment protection of sexually explicit material and instead concluded that the Detroit zoning ordinance should stand because it imposed only an incidental restriction on First Amendment rights in light of the test enunciated in *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1676, 20 L.Ed.2d 672 (1968).

[7]In *Murdock v. Pennsylvania*, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943), the Supreme Court found that a city ordinance requiring religious colporteurs to pay a license tax prior to their activities did not provide for a nominal fee imposed as a regulatory measure, and calculated to defray the expenses of policing the activities involved, but rather operated as a tax on the exercise of a fundamental right.

[8]Central does not raise, and we therefore do not consider, the question of–notwithstanding the ruling in *Young v. American Mini Theatres*, fn. 4, *supra*, that States may classify sexually explicit material differently from other material protected under the *First Amendment*–whether or not the classification drawn by Ordinance No. 2336 is justified by a paramount interest advanced by Minot. However, we note that the Court in *Young* approvingly pointed out that the record had disclosed a factual basis for the Detroit Common Council's conclusion that the zoning ordinance at issue in that case would effectively promote the City's interest in preserving the character of its neighborhoods.

[9]The guiding principles regarding the taking of private property by the Government for public purposes are found in the Fifth Amendment, U. S. Constitution, and in Article I, Section 16, North Dakota Constitution. Among the Government prohibitions itemized in the Fifth Amendment is the following: ". . . nor shall private property be taken for public use, without just compensation." Section 16, North Dakota Constitution, provides, in part: "Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for the owner." Central does not assert that the zoning-with-compensation scheme of Ordinance No. 2336 would violate these principles.

[10]Section 5-02-09, N.D.C.C., states:

"*Local regulations.*–The local governing body by ordinance or resolution may regulate or restrict the operation of licensees including among other things determining the number of licenses to be granted, establishing health and safety standards for licensed prem-

ises, setting of hours and prohibition of dancing or various forms of entertainment on the premises."

[11]At the time we decided *Four G's*, Section 12.1-27.1-12 did not include the language "except ordinances authorized by Section 5-02-09."

[12]That subsection states:

"3. A person is guilty of a class A misdemeanor if he, as owner or manager of an establishment licensed under section 5-02-01, permits an obscene performance in his establishement. A person is guilty of a class A misdemeanor if he participates, whether or not for compensation, in an obscene performance in an establishment licensed under section 5-02-01."

[13]At the legislative session following our decision in *Four G's*, the pre-emption statute at Section 12.1-27.1-12 was amended to allow municipalities to utilize Section 5-02-09 to control sexually oriented conduct in licensed liquor establishments. See 1979 N.D.Sess.Laws ch. 184.

[14]We emphasize that we do not see as significant the fact that *Midtown Palace* and *Four G's* involved licensed liquor establishments and not, as here, adult entertainment centers. The focus in both of those cases, as it is here, was on the issue of whether or not the attempts by the municipalities to control certain sexually related activities was done in violation of the State's general obscenity control pre-emption statute.

[15]We point out that as a result of recent legislative action consideration of this issue as it relates to Minot's zoning authority would have been unnecessary had Minot enacted Ordinance No. 2336 after April 1, 1981. On that date the Legislature enacted and made effective an emergency measure [S.B. 2237] which amended Section 12.1-27.1-12. The amendment specifically excepted the zoning authority of municipalities from the impact of the general pre-emption of obscenity control in Section 12.1-1-27.1-12. We do not view the action of the 47th Legislative Assembly in enacting S.B. 2237 as an indication the cities had no zoning authority in these instances; rather, we view it was a clarification of that authority. See, e.g., *St. Vincent's Nursing Home v. Department of Labor*, 169 N.W.2d 456 (N.D. 1969).

[16]The portion of Section 42-01-01 relied upon by Minot to support this contention states:

"*Nuisance—Definition*—A nuisance consists in unlawfully doing an act or omitting to perform a duty, which act or omission:

"1. . . .

"2. Offends decency;

"3. . . .

"4. . . ."

[17]Section 42-01-06, N.D.C.C., states:

"Public nuisance—Definition.—A public nuisance is one which at the same time affects an entire community or neighborhood or any considerable number of persons, although the extent of the annoyance or damage inflicted upon the individuals may be unequal."

[18]Section 42-02-04, N.D.C.C., states:

"If a place is found, upon the judgment of a jury, court, or judge having jurisdiction, to be a common nuisance, the sheriff, his deputy, or any constable of the proper county, or the police or marshal of any city or village where the nuisance is located, shall be directed to close and abate such place by taking possession thereof, together with all personal property used in keeping and maintaining such nuisance, and to close the same against use by anyone, and to keep it closed for a period of one year from the date of the judgment decreeing it to be a common nuisance. After judgment, such officer publicly shall destroy such personal property used in keeping and maintaining the nuisance. Any person breaking open said building, erection, or place, or using the premises so ordered to be closed, shall be punished for contempt as provided by this chapter."

Section 42-02-06, N.D.C.C., states:

"Termination of lease by owner under injunction releases property—Notice to tenant.—When leasehold premises are closed under an injunctional order or have been adjudged to be a nuisance, the owner thereof shall have the right to terminate the lease by giving three days' notice thereof in writing to the tenant, and after giving such notice, if the owner shall prove to the court that he was without fault, and had not knowingly nor negligently permitted the keeping or maintaining of the nuisance complained of, the premises shall be turned over to the owner upon the order of the court. The release of the property shall be upon the condition that the nuisance shall not be continued and that the return of the property shall not release any lien upon said property occasioned by any prosecution of the tenant. If the owner appears and pays all costs of the proceedings and files a bond with sureties to be approved by the court, conditioned that he immediately will abate said nuisance and will prevent it from being established or kept therein within the period of one year thereafter, the court or the judge, if satisfied of the owner's good faith, may order that the premises taken and closed be released

and the said order of abatement canceled so far as it may relate to said property."

[19]The 47th Legislative Assembly repealed Sections 12.1-1-27.1-04 through 12.1-27.1-10, N.D.C.C. See S.B. 2238. The repealed sections included special statutes providing for the procedures to be followed in obtaining the civil determination of obscenity required before a criminal conviction for violation of the Obscenity Control Act could be sought. Among these special statutes were Sections 12.1-27.1-08 and 12.1-27.1-09, which provided for the issuance of permanent and preliminary injunctions against the dissemination of materials subject to the provisions of the Obscenity Control Act.

EXHIBIT B

IN DISTRICT COURT

STATE OF NORTH DAKOTA

COUNTY OF WARD

NORTHWEST JUDICIAL DISTRICT

The City of Minot, a municipal corporation and political subdivision of the State of North Dakota; and, The State of North Dakota *ex rel.* Carroll Erickson,	)	MEMORANDUM OPINION
Plaintiffs,	)	Civil No. 45900
vs.	)	Filed
Central Avenue News, Inc., a foreign corporation, Donald G. Gitteison, and Mellinda Ann O'Connell,	)	September 19, 1980
Defendants.	)	

As the facts in this case were stipulated to at the pre-trial conference and are not in dispute, a recitation of them is not necessary at the outset.

There are basically two issues in this case which must be resolved:

I) Whether the Defendants' bookstore can be termed a nuisance and be closed and "padlocked" under the statutes of Chapter 42, NDCC.

II) Whether the City may effectively re-zone the area in which Defendants' bookstore is situated, thereby forcing them to move their establishment but at the same time compensating the Defendants for so moving.

I.

Plaintiffs bring this action seeking to have the bookstore declared a nuisance because of the nature of the bookstore's business, which is the selling of adult materials. If the bookstore is declared a nuisance, then the Plaintiffs also seek to have the bookstore premises closed and "padlocked" for one year and to have the bookstore property destroyed. Defendants contend that the bookstore does not constitute a nuisance nor should the premises be closed and property destroyed, on the grounds that such action would constitute a prior restraint upon the Defendants' First Amendment right of free speech.

Under § 42-01-01 NDCC, a nuisance consists in unlawfully doing an act or omitting to perform a duty, which act or omission:

(1) Annoys, injures, or endangers the comfort, repose, health or safety of others;

(2) Offends decency;

(3) . . .

(4) . . .

Under § 42-02-04 NDCC, if a place is found to be a nuisance, a law enforcement officer of the city where the nuisance is located shall close and abate such place by taking possession thereof, together with all personal property used in keeping and maintaining the nuisance, and close the same against use by anyone, and keep it closed for a period of one year from the date of the judgment decreeing it to be a nuisance. After judgment, such officer publicly shall destroy the personal property used in keeping and maintaining the nuisance. . . .

The first issue is whether the Defendants' business constitutes a nuisance under the statute or, more to the point, whether it "offends decency". The case law on this issue appears to hold that such conduct does constitute a nuisance in that it offends decency. The case of *People Ex. Rel. Busch* v. *Projection Room Theatre*, 550 P.2d 600 (Ca. 1976), held that the exhibition of obscene magazines and films was a form of activity which may be characterized as "indecent" and which may interfere with the comfortable enjoyment of life.

The issue as to whether a state has a legitimate interest in regulating the exhibition and distribution of obscene matter to consenting adults was resolved in the state's favor in *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49 (1973). Relying on the *Paris* case, the Court in *Busch, supra*, found that states may constitutionally determine that public exhibition of obscene material has a tendency to injure the community or to jeopardize the maintenance of a *decent* society, and that public nuisance laws may properly be employed to regulate the exhibition of obscene material to consenting adults.

In *Evans Theatre Corporation* v. *Slaton*, 180 S.E.2d 712 (Ga. 1971); cert. den. 404 U.S. 950, the Georgia Supreme Court also held that the exhibition of an obscene motion picture is a crime involving the welfare of the public at large, since it is contrary to the standards of *decency* and propriety of the community as a whole.

Because of the legitimate state interests in controlling the exhibition of obscenity which was outlined in *Paris*, a wide variety of cases have confirmed that such exhibitions constitute nuisances which properly may be abated by the courts. *See* cases cited in *Busch, supra*, pp. 606-07. However, all of these cases have dealt with the exhibition of *obscene* material and the right to abate the exhibition of *obscene*

material. The issue still remains as to whether the premises and the property therein which have not been judicially declared to be obscene may be properly abated without violating Defendants' First Amendment rights and acting as a prior restraint on free speech. This Court finds the answer to be clearly in the negative.

Referring again to the *Busch* case, the Court stated therein that prior restraints are not unconstitutional per se; a prior restraint may avoid constitutional infirmity if it occurs "under procedural safeguards designed to obviate the dancers of a censorship system". Thus it would be entirely permissible from a constitutional standpoint to enjoin further exhibition of specific magazines or films which have been finally adjudged to the obscene following a full adversary hearing. *Paris Adult Theatre* v. *Slaton, supra.*

One obscene book on the premises of a bookstore does not make an entire store obscene. *Sanders* v. *State*, 203 S.E.2d 153 (Ga. 1974). As stated in *Busch*, the "closing of the store and padlocking it as a public nuisance will, of course, halt the future sale and distribution of other printed material which may not be obscene, thereby precluding the application of the above procedural safeguards, prior notice and a prompt judicial hearing, and creating an unconstitutional restraint upon appellant (bookstore). This broad result cannot be reconciled with free expression under our Constitution."

This Court finds no reported cases authorizing the closing of a bookstore or theater, even after it has been repeatedly determined judicially in a full adversary hearing that all or substantially all of the magazines or films exhibited or sold therein are obscene. See *Busch*, p. 610. Furthermore, the courts of a number of states have held that such a closing of a bookstore in these types of cases are prior restraints which are constitutionally impermissible. See cases cited in *Busch*, p. 610.

The *Busch* court further stated that while a court of equity, having determined that particular magazines or films are obscene, after a full adversary hearing, may enjoin the exhibition or sale thereof by those responsible, the closing of such bookstores or theaters, either temporarily or permanently, or the enjoining of the exhibition or sale on said premises of magazines or films not specifically so determined to be obscene, constitutes an impermissible prior restraint in violation of the First and Fourteenth Amendments to the United States Constitution.

The Court in *Busch held* that abatement must be directed to particular books or films which have been adjudged obscene following a fair and adversary hearing, rather than against the premises in which the material is sold, exhibited or displayed. This same limitation on abatement of material not particularly adjudged obscene is found in numerous cases. See *State Ex. Rel. Cahalan* v. *Diversified Theat.*, 229 N.W.2d 389 (Mich. 1975); *State* v. *A Motion Picture Entitled "The Bet"*, 547 P.2d 760 (Kan. 1976).

The most recent case dealing with this subject is *Vance* v. *Universal Amusement Co.*, ___ U.S. ___, 63 L.Ed. 413 (1980). The *Vance* case dealt with the abatement and closing of an adults-only motion picture theater as a public nuisance under a Texas statute. The Supreme Court held that the Texas statute was unconstitutional under the First Amendment as authorizing a prior restraint on the exhibition of motion pictures. The Court stated that the regulation of a communicative activity such as the exhibition of motion pictures must adhere to more narrowly drawn procedures than is necessary for the abatement of an ordinary nuisance. Furthermore, the statutes authorized a prior restraint of indefinite duration on the exhibition of motion pictures that have not been adjudicated to be obscene.

The facts of the case at bar coupled with the over-

whelming case law on the subject dictate that the premises of the bookstore cannot be closed, nor may the personal property therein be destroyed pursuant to the abatement statute, § 42-02-04 NDCC. At the outset, none of the material involved in this present case has been declared to be obscene pursuant to North Dakota law, nor was the purpose of this present case to do so. Without that finding, the bookstore cannot be termed a nuisance as offending decency, as that is what prior case law points out. This Court is aware of prior proceedings wherein certain films that were exhibited in the bookstore were declared to be obscene. Pursuant to an injunction, however, those films are not presently being exihibited in the bookstore. While this Court has knowledge that obscene films have been shown at the bookstore in the past, it cannot prohibit exhibition of motion pictures in the future which have not been declared obscene. This is clear from *Vance* v. *Universal Amusement Co., supra.* Such a prohibition would clearly be an impermissible prior restraint upon First Amendment rights.

In light of the holdings in *Vance* and *Busch*, the abatement of the premises under § 42-02-04 NDCC does not meet constitutional requirements. It does not provide for a determination that the materials involved are obscene. It allows for the taking and destruction of *all* the personal property located in the premises. This is clearly not allowed under the holdings of *Busch* and *Cahalan, supra.* The statute also provides for the closing of the premises altogether regardless of whether some materials which the bookstore sells are not obscene. This clearly runs counter to the *Vance* holding. Unfortunately, the state of the law is that abatement must be directed to *particular books or films which have been adjudged obscene* following a fair and full adversary hearing. The abatement *cannot* be directed against the premises in which the material is sold, exhibited or displayed. To allwo the Plaintiffs to prevail on this issue would

played. To allow the Plaintiffs to prevail on this issue would missible under the First and Fourteenth Amendments.

In conclusion, the Court must rule in favor of the Defendants on the matter of nuisance. The Court is well aware the exhibits introduced in the hearing as samples of the "inventory" of the Defendant store are offensive, repulsive and obnoxious. However, in light of the North Dakota nuisance statute vis-a-vis the North Dakota obscenity control legislation, it presents an impossible situation to effect a closure of an operation such as the Defendants maintain under the nuisance provision.

II.

The zoning issue in this case arises from the action taken by the City in changing its zoning ordinances concerning the land area upon which the bookstore is now located. Initially, that area had been zoned as C-3, Commercial. Having no zoning ordinances with regard to adult entertainment centers such as the bookstore, the City of Minot, subsequent to October 1, 1979, enacted Ordinances 2336 and 2337 which attempt to define and regulate such centers. It should be noted that the bookstore had been in the process of procuring licenses and remodeling its building during September, 1979, and opened its doors for business on October 8, 1979, as a commercial enterprise in a properly zoned area in the City for such a business. The new ordinances provided that an establishment which met the requirements of an adult entertainment center were to be located in areas of the City which were zoned M-2, Heavy Industrial. In addition, there were other condtions and limitations placed on such businesses including a restriction prohibiting such an establishment from being any closer than 1250 feet from any pre-existing church, school or property zoned R-1, R-2, R-3 or R-4. These ordinances were to have a retroactive effective date of October 1, 1979, although they were not passed and approved by the City

Council until November 15, 1979. Section 4 of 2336 also contains a provision allowing for compensation to a person whose vested property rights are affected as a result of the re-zoning.

The Defendant maintains that the City's attempt to promulgate these ordinances are pre-empted by state law on this subject pursuant to § 12.1-27-12 NDCC. That statute states that " . . . no political subdivision shall enact new, or enforce existing, ordinances or resolutions regulating or prohibiting the dissemination or resolutions materials, or controlling obscene performances". Defendants also cite the case of *City of Grafton* v. *Four G's Inc.*, 252 N.W. 2d 79 (N.D. 1977) as authorityl for their interpretation of the pre-emption issue.

As a general rule, municipalities have the power to enact reasonable zoning regulations. 101A C.J.S. Zoning and Land Planning, § 7, P. 37. This power is derived from constitutional or statutory provisions and constitute an exercise of the police power. 101A C.J.S. Zoning and Land Planning, § 8-9, p. 42, 49. As a Home Rule City, the City of Minot has been granted, pursuant to law, certain powers. See § 40-05.1 1-06 NDCC. Under Subsection 11 of the above statute, the City has the power to provide for zoning, planning and subdivision of public or private property within the city limits. The Ordinances 2336 and 2337 are zoning ordinances which are aimed at regulating the place where adult entertainment centers may be located. Obscenity is, of course, still regulated by the appropriate North Dakota statutes. Zoning is not incompatible with the state's pre-emption statutes heretofore mentioned. As counsel know, it is elementary that the Court must construe all statutes as being compatible and not repugnant with one another, if at all possible. Furthermore, § 12.1-27.1-12 NDCC is concerned with ordinances which attempt to regulate or prohibit the dissemination of *obscene*

materials. As stated before, there has been no adjudication that the materials involved here are obscene. It is obvious some materials in the bookstore, although sexually oriented, may well not be obscene. Nothing in § 12.1-27.1-12 NDCC indicates that the legislature intended to abolish traditional municipal zoning powers which permit certain classes of uses to be restricted to certain geographical locations. In addition, the *City of Grafton* case has little bearing on this case as that case was directed to different issues altogether as applied to a liquor license. Therefore, this Court finds that § 12.1-27.1-12 NDCC does not preept the power of the City of Minot to promulgate Ordinaces 2336 and 2337.

The next issue is whether a City has the power to control the location of adult entertainment centers (bookstore) through zoning. This question was answered in the affirmative by the U. S. Supreme Court in *Young* v. *American Mini-Theatres*, 427 U. S. 50, 49 L. Ed 2d 310 (1976). That case dealt with a Detroit ordinance, one after which the Minot ordinance is apparently patterned, which defined the establishments and restricted the location of these businesses from 1,000 feet of any two other regulated uses or within 500 feet of a residential area. Such ordinances were upheld as valid by the Court.

The Court stated that, "We have no doubt that the municipality may control the location of theaters as well as the location of other commercial establishments, either by confining them to certain specified commercial zones or by requiring that they be dispersed throughout the the city. The mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating these ordinances." *Supra* at 321.

The Court also found that a 1,000 foot restriction did not, in itself, create an impermissible restraint on protected communication. "The city's interest in planning and regulating th use of property for commercial purposes is clearly adequate to support that kind of restriction applicable to all theaters within the city limits . . . (T)he regulation of the place where such films may be exhibited does not offend the First Amendment." *Supra* at 321-22. Thus the Court again asserts the doctrine that regulation as to time, place, and manner in regard to speech remains constitutional.

The Court in *Young* also found that the question whether speech is, or is not, protected by the First Amendment often depends on the content of the speech. The Court has held that the First Amendment affords some protection to commercial speech but that the measure of such protection to be afforded commercial speech will surely be governed by the content of the communication. *Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U. S. 748 (1976). Also in point are the cases which deal with the issues whether the First Amendment prohibits the government from wholly suppressing sexually oriented materials on the basis of their obscene character and the sale of such materials to juveniles. See *Ginsberg* v. *New York*, 390 U. S. 629 (1968). Relying on the cases, the Court in *Young* held that even though the First Amendment protects communication in this area from total suppression, the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures. *Supra*, p. 326.

The Supreme Court further stated that "it is not our function to appraise the wisdom of its (city's) decision to require adult theaters to be separated rather than concentrated in the same areas. *In either event, the city's interest in attmpting to preserve the quality of urban life is one that*

must be accorded high respect. . . . Since what is ultimately at stake is nothing more than a limitation on the place where adult films may be exhibited, even though the determination of whether a particular film fits that characterization turns on the nature of its content, we conclude that the city's interest in the present and future character of its neighborhoods adequately supports its classification of motion pictures. We hold that the zoning ordinances requiring that adult motion picture theatres not be located within 1,000 feet of two other regulated uses does not violate the Equal Protection Clause of the Fourteenth Amendment."

Thus it is clear that the City does have the constitutional power to regulate the location of an adult bookstore through use of zoning ordinances. The issue that remains is whether it can be done retroactively, if so, by compensating the Defendants for moving their business.

As a general rule, the restrictions of a zoning ordinance or regulation may not be made retroactive, but may be made to operate only prospectively. It has been held, however, that despite their retroactive operation, ordinances which have no adverse effect on vested or substantial rights, or which merely regulate rights or change their form, are not invalid, particularly where such ordinances are in the proper exercise of police power. 101A C.J.S. Zoning and Land Planning, § 18, pp. 81-82.

The Ordinance 2336 in Section 4 allows for compensating the property owner for any taking of his rights which may occur as a result of the new zoning. Thus we are dealing with a zoning with compensatoin provision. Such provisions are seen as a blending of the eminent domain power and the police power by providing for the payment of damages to a property owner whose property is damaged as a result of the land-use restriction. 82 AmJur2d § 6, pp. 391-92. Most of these provisions have been upheld and are

quite useful in connection with zoning in a limited area, especially where the restrictions appear harsh when applied to particular property and thus might raise questions as to whether the application constitutes a taking of property without compensation. See 41 ALR3d 636, Zoning With Compensation. Therefore, this Court finds that these provisions for zoning with compensation are valid and are a proper exercise of the City's police power.

The remaning issue is whether the retroactive application of the ordinance has an adverse effect on vested rights or is merely a regulation of them. The bookstore's rights to exhibit, disseminate and sell their products are not being affected by the enactment of these ordinances. These ordinances merely regulate the time, place and manner in which they can carry out their rights. These regulations as well as that of content are valid under *Young* v. *American Mini-Theaters.*

In line with the above is the separate concurring opinion of Justice Powell in the *Young* case. He stated that "the constraints of the ordinance with respect to location may indeed create economic loss for some who are engaged in this business. But in this respect they are affected no differently from any other commercial enterprise that suffers economic detriment as a result of land use regulation. The cases are legion that sustained zoning against claims of serious economic damage."

In the case at bar, the magnitude of economic loss which the bookstore might suffer will be mitigated by the compensation provided for in the ordinance and which the City stands ready to so provide. The ordinances merely regulate rather than adversely affect the rights involved. The City of Minot has silenced no message, has invoked no censorship, and has imposed no limitation upon those who wish to avail themselves of the bookstore's "merchandise".

Accordingly, this Court finds that the zoning Ordinances 2336 and 2337 are valid. This Court also finds that the fees required for the licensing of the movie projectors as well as the disclosure requirements as to possible past criminal records are reasonable and bear a rational relationship to the enforcement of the City ordinances in regard to adult entertainment centers.

As the Supreme Court in *Young* stated, "the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serous problems". *Supra*, p. 327. The City of Minot's solution to its problem is a reasonable one and one which should be enforced.

Accordingly, the Court finds in favor of the Plaintiffs on the issue of zoning. The Court will communicate with counsel for both sides regarding the effecting of this Order by appropriate Findings of Fact, Conclusions of Law and Order for Judgment.

Dated at Minot, North Dakota, this 17th day of September, 1980.

BY THE COURT:

WALLACE D. BERNING—Facsimile
District Judge

Original—Court file

cc—Mr. Nevin Van de Streek
Mr. Timothy J. Austin

EXHIBIT C

IN DISTRICT COURT

STATE OF NORTH DAKOTA

COUNTY OF WARD

NORTHWEST JUDICIAL DISTRICT

The City of Minot, a municipal corporation and political subdivision of the State of North Dakota; and The State of North Dakota *ex rel.* Carroll Erickson, Plaintiffs, vs. Central Avenue News, Inc., a foreign corporation, Donald G. Gittelson, and Mellinda Ann O'Connell, Defendants.	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR JUDGMENT Civil No. 45900 Filed October 6, 1980

FINDINGS OF FACT

1. The plaintiff, City of Minot (hereinafter called the City) is a municipal corporation and political subdivision of the State of North Dakota.

2. The plaintiff, Carroll Erickson (hereinafter called Erickson), at all times material to this lawsuit has been and is the Chief of Police for the City of Minot.

3. The defendant Central Avenue News, Inc. (hereinafter called Central), is a Delaware corporation which has since October of 1979 operated a business within the City of Minot under the name of the "Last Chance Bookstore." This

business is located in downtown Minot on West Central Avenue approximately one block west of Main Street. Its stock in trade consists of books, periodicals, films, and plastic or rubber articles, which graphically depict human sexual activities or human sexual organs. In addition the business premises contain a number of booths wherein a patron may observe a few minutes of film projected on an interior wall of the booth upon the payment of a quarter. The projected films graphically depict persons engaging in acts of sexual intercourse and other sexual activities. These booths and associated motion picture projectors are hereinafter referred to as "peep shows."

4. The defendant Donald Gittelson (hereinafter called Gittelson), at all times material to this litigation was and is the sole corporate stockholder of Central.

5. The defendant O'Connell was the manager of the Last Chance Bookstore at the time that the instant lawsuit was initiated. She is no longer employed by Central and both counsels agreed at the pre-trial conference that these proceedings may be dismissed without prejudice with respect to her.

6. In this action the City seeks an injunction requiring the defendants to adhere to the terms of two recently passed amendments to existing city ordinances, which to date defendants have refused to do on the grounds that under the First Amendment and Fourteenth Amendment to the United States Constitution the City can not compel them to take the actions required by the ordinances in dispute.

7. Joined with the action brought by the City described above, is an action brought by Erickson as realtor under the state nuisance laws (Titlet 42 North Dakota Century Code). Erickson requests (1) a ruling by the court that the business conducted by Central constitutes a nuisance as that

terms is used in Title 42: (2) an order padlocking the business premises for a period of one year pursuant to N.D.C.C. 42-02-04; (3) an injunction pursuant to N.D.C.C. 42-02-01 prohibiting the dissemination of certain materials introduced into evidence during the course of the trial, which materials were purchased at the Last Chance Bookstore from the agents of Central, and which materials are alleged to be obscene; and (4) an award of attorneys fees under N.D.C.C. 42-02-09. The City joins in on Erickson's claims for relief to the extent it has standing to do so under N.D.C.C. 42-01-09 and N.D.C.C. 40-45-01(44).

8. Although the defendants have not brought a counterclaim against the plaintiffs in their answer, nevertheless the defendants ask therein that the ordinances which the City is attempting to enforce be declared unconstitutional and that the court enjoin the City officials from undertaking further efforts to enforce these ordinances. Moreover the defandants request an injunction against the City officials with respect to certain claimed acts of harassment set forth in their prayer for relief.

9. The Last Chance Bookstore was the first, and to date is the only, adult bookstore to operate within the governmental jurisdiction of the City. Some few months before it opened its doors in October of 1979, City officials learned that an adult bookstore would be opening for business shortly. At that time the City had no ordinances which specifically sought to regulate businesses of the sort operated by Central. After studying possible solutions to the problems which were thought likely to arise from the existence of an adult bookstore in the community, the City Council enacted two ordinances, numbers 2336 and 2337, which the Council thought would best address these perceived problems. It is these ordinances which the defendants refuse to obey and which the City is attempting to enforce in the instant action.

10. Ordinance 2336 is an amendment to the City of Minot Zoning Ordinance. It adds to the zoning ordinance definitions of the terms "adult bookstore," "adult cinema," and "adult entertainment center;" the last term embraces the first two. Under the city zoning ordinance as amended by ordinance 2336 an adult entertainment center can lawfully operate only in an M-2 Heavy Industrial District and then only if it meets the requirements imposed by ordinance 2336. These include provisions that the adult entertainment center be located no closer than 1,250 feet from a pre-existing church, school, or residential district; that the center exclude minors; that the managers and owners of the center supply the Chief of Police with their names, fingerprints, prior criminal records, and such other information as the Chief might reasonably require; and that the business premises be open to police officers without their having to pay a cover charge.

11. Central concedes that its business operations make it an adult entertainment center as that term is used in ordinance 2336 and that if the ordinance is a valid enactment the ordinance is applicable to it.

12. Ordinance 2336 and ordinance 2337 were not passed on second reading, and thus under North Dakota law were not effective, until November 5, 1979. However, ordinance 2336 explicitly provides for a degree of retroactive application. That is, although the restrictions imposed thereby are not effective until final passage of the ordinance, the restrictions when effective apply to adult entertainment centers which were in lawful operation for some time prior to the effective date of the ordinance. Thus the usual "grandfather protection" afforded to a valid prior nonconforming use by the zoning laws is specifically withdrawn from adult entertainment centers. Consequently the Last Chance Bookstore must now move its business location in order to comply with the city zoning laws even though

at the time that it opened its doors for business it was in compliance with those zoning laws at its then location.

13. Ordinance 2336 explicitly recites that it is to be applied in the retroactive manner just recited and it goes on to provide that if a "taking" of property rights is accomplished by the retroactive feature of the ordinance the person whose rights are taken is to be compensated in the constitutionally required amount.

14. By an agreement between counsel the court specifically reserves the questions (1) whether, based upon its reasonable investment-based expectations, property of Cntral would be "taken" by the retroactive application of 2336 and (2) if so, what is the proper amount of monetary damages required to make Central whole.

15. Ordinance 2337 amends the portion of the City Code of Ordinances pertaining to the licensing of mechanical amusement devices. Prior to the amendment effected by this ordinance a mechanical amusement device had to be licensed and a license fee with respect to the device had to be paid. The license fee imposed was $15.00 per mechanical amusement device per year but with the maximum of $250.00 a year for a license covering 17 or more machines under common ownership.

16. Prior to the effective date of ordinance 2337, that is, November 5, 1979, a mechanical amusement device was defined in section 6-42 of the City of Minot Code of Ordinances as "a machine which, upon the insertion of a coin or slug operates or may be operated for use as a game, be used for any such games, contest or amusement." contest or amusement of any description, or which may Subsequent to the November 5, 1979 amendment, the definition of a mechanical amusement device set forth in section 6-42 specifically includes "a machine . . . which

depicts, displays or projects directly or indirectly pictures, photographs, or other visual images."

17. The parties stipulated to the admission into evidence of defendant's exhibit A which is a map prepared by the City Planning Department which depicts the lands subject to the City of Minot's zoning jurisdiction wherein Central could relocate its business consistently with the restrictions imposed by ordinance 2336. The court finds there is available for such purposes land which is equivalent in area to a combination of many city blocks.

18. I find that the fees and restrictions imposed in the licensing process are not unreasonable in view of the additional hours of city personnel expended in monitoring such a business as is operated by the defendants.

CONCLUSIONS OF LAW

1. The court has jurisdiction over the parties and the subject matter of this lawsuit.

2. To the extent that any of the foregoing findings of fact could be construed or ought properly to be viewed as conclusions of law, the court hereby adopts and reaffirms them as conclusions of law.

3. The $300.00 a year per machine license fee is reasonably calculated to defray the City's costs in routinely and periodically monitoring the peep shows with respect to which such fees are paid in order to see that the machines are not used - either inadvertently or by design - to show films which are obscene under state law. Inasmuch as the control of obscenity is a substantial government interest, the Court concludes that the singling out of peep shows which show sexual materials in order to submit such peep shows to greater police scrutiny, and the imposition of a higher tax upon peep shows in order to pay for

such increased police scrutiny, is a reasonable classification tailored to serve a substantial governmental interest.

4. Ordinance 2337 places reasonable time, place and manner resctrictions on the free speech rights of the defendants guaranteed to them by the state and federal Constitutions.

5. Additionally, the Court concludes that neither ordinance 2336 or 2337 are superseded by state law because neither one seeks to prohibit the dissemination of obscene materials or to regulate obscenity *per se*.

6. The Court concludes there is no evidence of bad faith or harassment as claimed by the defendants in their prayer for relief set forth in their answer.

ORDER FOR JUDGMENT

The Clek of District Court is directed to enter the judgment which is attached hereto and by this reference incorporated herein. Moreover, pursuant to Rule 54 (b) of the North Dakota Rules of Civil Procedure the court finds that notwithstanding that all the issues between the parties have not been decided by virtue of the Memorandum Opinion, Findings of Fact, Conclusions of Law, and Order for Judgment, in that there still remains to be determined the issue of compensation to be paid by the City to the defendant for the taking of its vested rights by the retroactive application of the zoning ordinance in litigation, nevertheless, there is no just reason for delay in the entry of a judgment determining the matters decided to date and for that reason the judgment referred to earlier is directed to be entered as foresaid. Upon a determination by way of stipulation or trial the court will enter in favor of the defendants and against the City with respect to the compensation to be paid by the City to the defendants for the taking of the defendants vested

property rights by retroactive application of ordinance 2336.

Dated at Minot, North Dakota, this ..... day of September, 1980.

BY THE COURT:

Honorable Wallace D. Berning
District Judge

EXHIBIT D

IN DISTRICT COURT

STATE OF NORTH DAKOTA

COUNTY OF WARD

NORTHWEST JUDICIAL DISTRICT

The City of Minot, a municipal corporation and political subdivision of the State of North Dakota; and, The State of North Dakota *ex rel.* Carroll Erickson, Plaintiffs, vs. Central Avenue News, Inc., a foreign corporation, and Donald G. Gittelson. Defendants.	JUDGMENT Filed October 6, 1980

The above entitled matter came on for trial in the District Courtroom, Ward County Courthouse, Minot, North Dakota, on the 30th day of July, at 9:00 A.M. The Honorable Wallace D. Berning, District Judge, heard the case without a jury. The plaintiffs appeared by and through their attorney Nevin Van de Streek of Minot, North Dakota and the defendants by and through their attorney Timothy J. Austin of Mandan, North Dakota. The court heard the evidence offered by the parties including oral testimony, cross-examination of witnesses, and the receipt of exhibits. The taking of testimony was concluded on July 30, 1980 and the court took the matter under advisement. Thereafter the court entered its Memorandum Opinion dated September 17, 1980. Based on this Memorandum Oipinion the

court entered its Findings of Fact, Conclusions of Law and Order for Judgment on the 6th day of October, 1980.

Now, therefore, based upon the aforesaid Order for Judgment and upon the motion of Nevin Van de Streek, attorney for the plaintiffs, it is hereby ordered, adjudged and decreed:

The defendants Central Avenue News, Inc. and Donald G. Gittelson are hereby permanently restrained and enjoined from operating that certain business known as the "Last Chance Bookstore" within the zoning jurisdiction of the City of Minot except on the following terms and conditions:

1. The character of the business is changed to the extent that it no longer falls within the definition of an "adult entertainment center" set forth in section 2.1 (1.3) of the City of Minot Zoning Ordinance—ordinance 1149, as amended; or

2. The business relocates within the zoning jurisdiction of the City of Minot in conformance with section 15-5 of the City of Minot Zoning Ordinance—ordinance 1149, as amended.

Moreover, the defendants Central Avenue News, Inc. and Donald G. Gittelson are perpetually restrained and enjoined from operating or make available for others to operate mechanical amusement devices (as that term is defined in section 6-42 of the Code of Ordinances) on a regular basis to depict or display specified anatomical areas or

specified sexual activities (as those terms are defined in section 2-1 of the City of Minot Zoning Ordinance, ordinance 1149, as amended), within the city limits of the City of Minot unless the defendants first obtain and maintain a

license for each such machine pursuant to the provisions of article IV of chapter 6 of the City of Minot Code of Ordinances.

The second count of the plaintiffs' complaint is dismissed with prejudice because it does not state a claim upon which relief may be granted. Upon application to the Clerk of District Court the plaintiffs may have refunded to them the Two Hundred Fifty and no/100 Dollars ($250.00) cash deposited in lieu of the bond required by NDCC 42-02-02.

Finally, under Rule 54 (b) of the North Dakota Rules of Civil Procedure the court has directed the entry of this judgment as a final judgment with respect to the issues determined hereby based upon the express determination that there is no just reason for delay.

WITNESS, the Honorable Wallace D. Berning, District Judge, Ward County District Court, Northwest Judicial District and my hand and the seal of this court on this ..... day of ....., 1980.

Eldore Leier—Facsimile

District Court Clerk

By: .....
Deputy

EXHIBIT E

STATE OF NORTH DAKOTA

IN THE SUPREME COURT

The City of Minot, a municipal corporation and political subdivision of the State of North Dakota; and The State of North Dakota *ex rel.*, Carroll Erickson,	)	CIVIL ACTION NO. 9918 45900 Filed In The Supreme Court October 6, 1981
Plaintiffs/Appellees and Cross-Appellants	)	
vs.	)	
Central Avenue News, Inc., a foreign corporation and Donald G. Gittelson,	)	
Defendants/Appellants and Cross -Appellees.	)	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Central Avenue News, Inc., and Donald G. Gittleson, the Defendant/Appellants and Cross-Appellees above-named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of North Dakota, upholding the constitutionality of the City of Minot's Ordinances Number 2336 and 2337, entered herein on July 18, 1981.

This appeal is taken pursuant to 28 U. S. C. § 1257 (2).

Dated this 24th day
of September, 1981.

TIMOTHY J. AUSTIN—Facsimile
Local Counsel for Appellants
P.O. Box 785
Mandan, North Dakota 58554
663-9819
Dated this 5th day of
October, 1981.

ARTHUR M. SCHWARTZ—Facsimile
Counsel for Appellants
The Market Center
1650 Market Street (701)
Denver, Colorado 80202
(303) 893-2500

EXHIBIT F

STATE OF NORTH DAKOTA

IN THE SUPREME COURT

The City of Minot, a municipal corporation and political subdivision of the State of North Dakota; and The State of North Dakota *ex rel.*, Carroll Erickson, Plaintiffs/Appellees and Cross-Appellants, vs. Central Avenue News, Inc., a foreign corporation and Donald G. Gittelson, Defendants/Apellants and Cross -Appellees.	)	CIVIL ACTION NO. 9918 Filed In The District Court for Ward County October 6, 1981

NOTICE OF APPEAL TO THE SUPREME COURT

OF THE UNITED STATES

Notice is hereby given that Central Avenue News, Inc., and Donald G. Gittelson, the Defendant/Appellants and Cross-Appellees above-named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of North Dakota, upholding the constitutionality of the City of Minot's Ordinances Number 2336 and 2337, entered herein on July 18, 1981.

This appeal is taken pursuant to 28 U. S. C. § 1257 (2).
Dated this 24th day
of September, 1981.

TIMOTHY J. AUSTIN—Facsimile
Local Counsel for Appellants
P.O. Box 785
Mandan, North Dakota 58554
663-9818
Dated this 5th day of
October, 1981.
Counsel for Appellants

ARTHUR M. SCHWARTZ—Facsimile
The Market Center
1650 Market Street (701)
Denver, Colorado 80202
(303) 893-2500

Motion to Dismiss or Affirm

Office - Supreme Court, U.S.
FILED
NOV 19 1981
ALEXANDER L. STEVAS,
CLERK

NO. 81-734

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

CENTRAL AVENUE NEWS, INC., AND
DONALD G. GITTELSON,

APPELLANTS,

VS.

THE CITY OF MINOT, A MUNICIPAL
CORPORATION AND POLITICAL SUBDIVISION
OF THE STATE OF NORTH DAKOTA, AND STATE
OF NORTH DAKOTA EX. REL. CARROLL ERICKSON,

APPELLEES.

ON APPEAL FROM THE SUPREME COURT
OF NORTH DAKOTA
MOTION TO DISMISS OR IN THE
ALTERNATIVE TO AFFIRM

NEVIN VAN DE STREEK
Counsel of Record
Eaton, Van de Streek & Ward
312 Midwest Federal Savings
& Loan Bldg.
Minot, North Dakota 58701
(701) 852-4837

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

NO. 81-734

CENTRAL AVENUE NEWS, INC., AND
DONALD G. GITTELSON,

Appellants,

vs.

THE CITY OF MINOT, A MUNICIPAL
CORPORATION AND POLITICAL SUBDIVISION
OF THE STATE OF NORTH DAKOTA, AND STATE
OF NORTH DAKOTA ex. rel. CARROLL ERICKSON,

Appellees.

ON APPEAL FROM THE SUPREME COURT
OF NORTH DAKOTA
MOTION TO DISMISS OR IN THE
ALTERNATIVE TO AFFIRM

The appellees, the City of Minot and Carroll Erickson, respectfully move the court for an order dismissing the above appeal on the grounds that it does not present a substantial federal question, or, alternatively, for an order affirming the decision appealed from on

the grounds that it was rightly decided.

TABLE OF CONTENTS

Index	Page
Motion To Dismiss Or In The Alternative To Affirm	1
Table Of Contents	2
Table Of Authorities	2
Statement Of The Case	4
Law And Argument	5

TABLE OF AUTHORITIES

American Communication Asso. v. Douds 339 US 382 (1950) 25

Bayside Enterprises, Inc. v. Carson (Bayside II) 470 F.Supp. 30 (W.D. Ky. 1978) ..... 14 et seq.

Borrago v. City of Louisville 456 F.Supp. 30 (W.D. Ky. 1978) 33

Buckley v. Valeo 424 US 1 (1976) 25

Central Hudson Gas v. Public Service Comm'n 447 US 557 (1981) 26

Cox v. New Hampshire 312 US 569 (1941) ..... 9 et seq.

FCC v. Pacifica Foundation 438 US 726 (1978) 25

Freedman v. Maryland
308 US 1 (1965).....6

Genusa v. City of Peoria
475 F.Supp. 1199 (1979).....39

Grosjean v. American Press Co.
297 US 233 (1936).....21 et seq.

Hauge v. CIO
307 US 496 (1939).....6

Heller v. New York
413 US 483 (1973).....30 et seq.

Hines v. Winfree
182 A. 2d 698 (PA. 1962).....14 et seq.

Lo-Ji Sales, Inc. v. New York
442 US 319 (1979).....31

Lovell v. City of Griffin
303 US 444 (1938).....6

Marcus v. Search Warrant Property
367 US 717 (1961).....30

Miller v. California
413 US 15 (1973).....16

Murdock v. Pennsylvania
319 US 105 (1943).....9 et seq.

O'Brien v. United States
391 US 367 (1968).....25

Paris Adult Theater v. Slaton
413 US 49 (1973).....27 et seq.

Roth v. United States
354 US 476 (1957).....16

Schad v. Borough of Mount Ephraim
101 S.Ct. 2176 (1981).....35 et seq.

Star v. Preller
352 F.Supp. 530 (D. Maryland, 1972).33

United States Labor Party v. Codd
527 F. 2d 118 (CA. 2, 1975).....33

Universal Film Exchange, Inc. v. City of Chicago
288 F.Supp. 286 (ND Ill. 1968).....33

Young v. American Mini Theaters
427 US 50 (1976).....34 et seq.

STATEMENT OF THE CASE

The appellees (hereinafter referred to as "the City") accept the statement of the case presented by the appellants (hereinafter referred to as "the Bookstore") except in two particulars. First, the City denies that the two challenged ordinances were "designed to force the Bookstore out of business." (Jr.St. p. 7.)

Second, the civil suit from whence this appeal arises was filed November 8, 1979, and not September 9, 1980. (Jr.St. p. 8.)

LAW AND ARGUMENT

I.

The License Fee Should Be Considered As Principally A Monetary Imposition Levied Upon The Bookstore, Rather Than As A "Prior Restraint" As That Term Is Ordinarily Employed, And As Such It Is Constitutional Because It Produces Income To Defray The Governmental Cost Of Policing Non-Speech Activities Inextricably Associated With, Or Reasonably Thought To Be Inextricably Associated With, The Protected First Amendment Activities Of The Bookstore.

The challenged license fee and the licensing program of which it forms a part, contrary to the Bookstore's contention, do not constitute a prior restraint on free speech in its purest and most obnoxious form. That is, there is not involved here a system of censorship whereby governmental authorities require

an approval as to acceptability of content or message before a speech can be made, a publication distributed, or a work of art displayed, as was the case in Hauge v. CIO, 307 US 496 (1939), Lovell v. City of Griffin, 303 US 444 (1938), and Freedman v. Maryland, 380 US 1 (1965).

To the contrary, as authoritatively construed by the North Dakota Supreme Court, the ordinance does not lodge any discretion in the hands of the City officials to withhold a license because its issuance is a ministerial act rather than a discretionary one. All that is required of the Bookstore in order for it to obtain the necessary licenses to operate its peep shows is that it identify the machines to be licensed and pay the appropriate fee. (See pp. 33-34 of the Jr.St.)

The license fee in the instant case

constitutes a "prior restraint" only in the narrow technical sense that chronologically it must be paid before the license will issue. But there is no claim by the Bookstore that because of its indigency or otherwise that this requirement as a practical matter operates as a prior restraint in the sense of making it difficult or impossible for the Bookstore to exercise its First Amendment Rights. Moreover, the Bookstore has never suggested that if the license fee were payable at the end of the license period rather than at the beginning that it would find the fee any less objectionable. Obviously then the crux of the Bookstore's complaint against the fee is that it is in effect a tax which impermissibly burdens or abridges the Bookstore's freedom of speech, and it is upon that basis that the constitutionality of the fee must be

judged.

Under this heading of its argument the City accepts as indisputable the statement of Mr. Justice Douglas in Murdock v. Pennsylvania, 319 US 105 (1943) that:

> The First Amendment, which the Fourteenth makes applicable to the states, declares that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press....' It could hardly be denied that a tax laid specifically on the exercise of those freedoms would be unconstitutional. 319 US 108.

The City submits, however, that the license fee when viewed in regard to its true effect and incidence, is not primarily a tax imposed on speech protected by the Constitution, but rather it is a permissible monetary imposition against non-speech conduct, which conduct is appurtenant to and very closely linked

to the Bookstore's protected First Amendment activities. Moreover the City submits that the appurtenant conduct subject to taxation is so entangled with the protected activities that the two cannot be separated for purposes of taxation and that under these circumstances the monetary imposition is permissible under previous cases of this and other courts.

The leading case in this Court upholding a monetary imposition in connection with the admittedly constitutionally protected exercise of free speech is Cox v. New Hampshire, 312 US 569 (1941). In that case this Court upheld a law of the State of New Hampshire which required persons using the public streets for a parade to first obtain a special license therefor from the local authorities, and to pay a license fee up to $300.00 in amount. This Court did

not analyze the case as involving pure conduct alone, with no element of First Amendment Rights being implicated. If the court had viewed the case as involving conduct not arising to the level of symbolic speech or conduct not serving to facilitate communication, then the case would have been easily disposed of by a mere citation to the police power of the state, which presumably would support a complete ban on parading at any time under any circumstances. Rather the court accepted the parading as being an integral part of the appellant's First Amendment activities which was an appropriate conclusion under the facts of the case wherein it appears that the appellants held placards and distributed literature in the course of their march. Notwithstanding the involvement of First Amendment values the court was of the opinion that

the licensing program was an acceptable means of imposing reasonable time, place and manner restrictions on the exercise of the appellant's First Amendment Rights.

It is this combination of speech and conduct intertwined together which most likely explains why the $300.00 license fee in Cox was upheld. Surely the court would not have sustained the fee if it had been imposed upon "pure speech" alone. It was the physical conduct of the appellants - their parading and marching - which required the local authorities to assert a greater regulatory effort directed towards preserving the safety and convenience of the public streets. This increase in the burden laid on public agencies served as the permissible basis for making a monetary imposition against the persons whose activities or conduct

augmented the burden.

By way of contrast, in Murdock, supra, when this Court was faced with a tax against the pure exercise of First Amendment Rights, the tax was struck down. Apparently the license fee in Murdock was viewed as a "charge for the enjoyment of a right granted by the federal constitution" because it was a flat fee, not "nominal" and "not apportioned," and because the proceeds thereof were not used "to defray the expenses of policing the activities in question." 319 US 314.

The factual basis for the last point seems somewhat unclear from reading the Court's opinion, but apparently in Murdock the municipality did not claim or attempt to prove that any governmental expenses were incurred with respect to the policing or supervising of the activity of the licensees (other

than, presumably, the clerical expenses involved in issuing the license). Rather the municipality defended its ordinance on the grounds that the solicitation of funds by Murdock and the other petitioners gave their conduct a commerical aspect which removed it from the protection of the First Amendment. Apparently the majority of the court found that the absence of proof or argument on this point was sufficient to justify the conclusion that no extra police activities were put forth by the community officials in regard to the licensees, so that there were no regulatory expenses to defray from the fee proceeds.

But when it can be shown that the monetary imposition made upon the exercise of First Amendment Rights is designed to defray some of the expenses associated with overseeing non-speech

consequences which flow from the exercise, courts have upheld the validity of the imposition. Thus in Hines v. Winfree, 182 A. 2d 698 (PA 1962) the Pennsylvania Supreme Court upheld a $25.00 per day fee for the issuance of a permit to operate a sound truck, which sound truck was used in campaigning by a political candidate. The municipal ordinance pursuant to which the permits were issued imposed stringent noise limitations on the operation of a sound truck, the enforcement of which required constant police surveilance of the truck, at considerable expense to the city. In view of this the Pennsylvania Supreme Court held that the city was able to establish the reasonableness of the fee.

Similarily in Bayside Enterprises, Inc. v. Carson, 470 F.Supp. 1140 (MD Fla. 1979) (Bayside II) the district

court upheld a wide ranging program of permit fees imposed against adult uses. For example, adult bookstores were subject to a $400.00 per year fee and the fee for a permit approximately equivalent to the City of Minot permit at issue in the case at bar was $35.00 a year. The Bayside II court upheld the constitutionality of the fee schedule on the rational that the proceeds would be used to fund the policing of activity incidental to the operation of the adult enterprises. The nature of such activities was not specifically stated, but apparently the court had in mind that among other things prostitution and homosexual activity occurring at the adult entertainment centers would be investigated. The district judge did not contemplate that the license fees would fund the investigation of the dissemination of obscene materials and

to that extent Bayside II is distinguishable from the instant case. However that distinction is not crucial. The cases just discussed all involve the imposition of fees to fund the policing of activities which although associated with speech, were primarily non-communicative in nature, that is, the physical disruption of traffic caused by a parade; the noise, as opposed to the message, produced by sound amplifying equipment; and vice crimes. Likewise because obscenity is not treated as protected speech for purposes of the First Amendment, Roth v. United States, 354 US 476 (1957), Miller v. California, 413 US 15 (1973), obscenity can be equated with the types of non-communicative activity just referred to. Consequently, at least in the context of erotic film fare, if not generally, to the extent that obscenity is substantially

intertwined with, or reasonably thought to be intertwined with, the presentation of protected film, a fee can be assessed against the presumptively protected films in order to fund the cost of enforcing regulations or conducting investigations to ferret out the obscene works which are intermingled with those which are protected.

It might be objected that obscene films are not invariably associated with the display of sexually explicit films and that in fact all films shown by the Bookstore have been and will be non-obscene. But surely the government may rely on justified apprehensions in that regard or the result in Cox, supra, would be unsupportable. Moreover, the low incidence of obscene films to non-obscene films, if it prevails, may indicate the policing activity has a beneficial prophylatic effect, rather

that it is unnecessary.

Obviously the rejoinder to the argument made under this heading is that the power to tax is the power to destroy. Permit fees might be made so onerous that they supress the distribution of constitutionally protected erotic materials. This would only be true if the authorities were not obligated to observe a rule of reason in levying such charges. Thus undoubtedly the authorities might be required in every instance to demonstrate that the amount of the fee was set in good faith with a view towards imposing the minimum financial burden consistent with adequate law enforcement of the obscenity laws as they relate to the activity for which a fee is paid. Under this test the courts should be able to distinquish and to invalidate those fees which are merely punitive in intent and effect.

Nevertheless the authorities should be given some discretion to vary the fee depending upon the intensity of scrutiny necessary to examine the films being shown. A fee charged against a single viewer "peep show" which changes films on a weekly basis can justifiably be set higher than a fee imposed against a motion picture theater which displays one feature film for an extended run of many weeks.

Additionally, as part of the determination of the reasonableness of a permit fee, the reviewing court will want to consider the actual financial impact on the fees of the profitability of the licensed business. Even the fee which is reasonably related to the cost of enforcing the obscenity laws may be unconstitutional if the fee substantially rather than incidentally discourages the dissemination of protected erotic

materials. But in the case at bar the Bookstore made no claim that the permit fee of less than $1.00 per day per machine actually tended to reduce by one iota the variety, amount, or type of sexual materials which the Bookstore is offering to the community of Minot.

It should be emphasized that the City seeks to apply its license fee only in the context of showing motion pictures which routinely depict sexual activity or the sexual parts of the human body. As will be demonstrated in part II hereof, motion picture films present unique governmental problems in the context of enforcing obscenity laws, which problems are not found in regard to printed materials or the spoken word. Thus no claim is made that a fee can be constitutionally applicable to other forms of speech or of the press.

II.

Even If Viewed As A Tax On The Exercise Of First Amendment Rights, The License Fee Is Constitutional Under A Balancing Test Which Takes Into Account The Weight To Be Afforded Society's Interest In Imposing The Tax Against The Interest Of The Individual In Viewing Erotic Film Fare.

This Court has never held except by way of dicta that a government may never at any time and under any conditions whatsoever impose a tax on the pure exercise of First Amendment Rights. The cases in this Court wherein taxes were invalidated on First Amendment grounds are susceptable to being limited to their unique facts, which distinquish those cases from the instant case. In Grosjean v. American Press Co. 297 US 233 (1936) the court emphasized that the challenged tax was a "tax on knowledge" and that the long history of like taxes

in England and during colonial times in this country indicated "that the dominant and controlling aim was to prevent, or curtail the opportunity for, the acquisition of knowledge by the people in respect of their government affairs." 297 US 247. Hence the tax implicated primary First Amendment values and was invalid. Yet the Court also seemed to rest its decision in part on the feature of the tax, which was a tax on the advertising revenue of newspapers, whereby newspapers with less than 20,000 circulation per week were exempted from the tax. The tendency of this exception to curtail circulation was noted. 297 US 244-245. Moreover the same exception was later characterized as "suspicious" and as being designed to constrict the circulation of a selected group of newspapers. 297 US 251.

Two aspects of Grosjean separate it

from the case at bar. Here we are not concerned with "core" values of the First Amendment, that is, political speech and debate, but rather with speech which although protected, is not the essence of liberty for which the patriots bled and died at Valley Forge. Secondly, the record in this case is lacking any proof tending to show that the fees charged by the City would be passed on to viewers of the peep shows and that consequently the patronage thereof will be correspondingly reduced or discouraged. Nor is there any indication in the record that the cost of the fee, if not passed on to the consumer, will so impair the profitability of the machines that the Bookstore will offer less in erotic film fare then it would in the absence of a fee. Any argument that either or both results will automatically follow the imposition

of the fee is mere speculation.

Likewise, Murdock, supra, can be distinquished by the implication found therein that the petitioners were entitled to enhanced First Amendment protections because they were asserting the right to the free exercise of religion as well as the right of free speech. "The Constitutional rights of those spreading their religious beliefs through the spoken and printed word are not to be gauged by standards governing retailers or wholesalers of books." 319 US 111.

Even if one were to assume, arguendo, that the inevitable effect of the license fee will be to reduce by some appreciable amount the availability of erotic peep shows in Minot, there are still sound reasons why the fee ought to be upheld. This Court in the past has permitted burdens to be imposed

upon the exercise of First Amendment Rights. FCC v. Pacifica Foundation, 438 US 726 (1978); O'Brien v. United States, 391 US 367 (1968); Buckley v. Valeo, 424 US 1 (1976); American Communication Asso. v. Douds, 339 US 382 (1950). A tax is a burden, admittedly, but for purposes of constitutional analysis it ought to be treated like any other burden.

That is, generally stated, the test should be (1) whether the social benefit, to which the burden is incident, is a legitimate governmental interest, (2) whether the general advantage to the public produced by the program outweighs the individual private interest adversely affected thereby, and (3) whether a program less restrictive of First Amendment Rights would produce substantially the same benefit to the public, given the practicalities of the

situation.

In other words, the City urges upon the Court that an analysis somewhat akin to that employed in Central Hudson Gas v. Public Service Comm'n, 447 US 557 (1981) be used in reviewing the constitutionality of regulations pertaining to the dissemination of published materials or other matter which predominately describe or depict sexual activities.

In this instance the modified form of that test would lead to the following results: First, the exact nature of the burden must be identified, in this case the license fee imposed on the display of erotic film fare. Second, the public benefit associated with the burden must be established, in this case the funding of governmental costs involved in enforcing the obscenity law with respect to the display of erotic film fare. Third, the legitimacy of accomplishing the pub-

lic benefit must be considered; in the case at bar this issue was foreclosed by this court's decision in Paris Adult Theater v. Slaton, 413 US 49 (1973).

Fourth, a positive correlation must be established between the imposition of the burden and the accomplishment of the public benefit. In the instant case it should be immediately recognized that tax revenues are the fuel on which government programs run, so the correlation between the burden and benefit is immediate and direct. Fifth, the individual interests being affected must be appraised, in this case the interest being the right to view erotic films, which although constitutionally protected, does not lie at the heart of First Amendment values. Sixth the practicality of imposing a less restrictive burden, consistent with producing the same benefit, must be considered.

In the instant case the City could choose among three alternatives to lessen the burden of its license fee imposed against presumptively protected erotic film fare, while at the same time funding its obscenity law enforcement efforts. (1) It could narrow the scope of the fee by applying it only to the display of obscene materials. (2) Without imposing a general tax, it could broaden the coverage of the license fee to include more activities and reduce the amount imposed against any particular activity. (3) It could forego the special license fee and rely upon general tax revenues.

The first alternative is unworkable under Fifth Amendment grounds because the dissemination of obscene materials is a criminal act under North Dakota law and the City of Minot has no way of granting immunity from state prosecution

to those persons who might incriminate themselves by paying the license fee.

The second and third alternatives are variations on the same theme and can be treated jointly. The ultimate issue is whether distinctive and unique societal costs attributable to a particular mode of expression can be recouped from those persons who avail themselves of such mode. The City believes that a short and affirmative answer to that question is presented by Cox, supra. The ultimate effect of that ruling is to provide that if individuals resort to parades and protest marches as a means of expression they can be required to pay some of the costs of crowd and traffic control occasioned thereby. Surely this is more fair than a constitutional rule absolutely requiring in all instances that the general coffers be tapped for all governmental costs

incidental to the exercise of free speech.

Moreover, as in Cox, the particular method of communication here subject to an assessment of a fee is one which generates unique law enforcement problems. The activity regulated is that of showing sexually explicit films. To the extent that any of these films are obscene they may lawfully be made the subject matter of an obscenity prosecution. However, the gathering of evidence to support that kind of prosecution is quite expensive, cumbersome and difficult. As the result of this Court's decisions in Marcus v. Search Warrant Property, 367 US 717 (1961), and Heller v. New York, 413 US 483 (1973) law enforcement officers are required to view the films in peep shows such as those operated by the Bookstore, to make careful notes about the contents

thereof, to reduce the notes to the form of affadavits, to obtain a search warrant, to copy the films, and then to return the original films. The last two steps must be done quickly in order to avoid an invalidation of all the prior proceedings. Theoretically this process could be simplified by asking the magistrate to view the films, as was done in Heller, supra, but the possibility of violating the restrictions of Lo-Ji Sales, Inc. v. New York, 442 US 319 (1979) may discourage prosecutors from so doing. By way of contrast, a criminal obscenity prosecution of a magazine or book can usually be accomplished by purchasing one copy of the offending item. No complicated search warrant proceedings or duplication costs are involved. Consequently the greater expense incurred in enforcing the obscenity law with regard to films, as

opposed to other First Amendment materials, justifies the levying of a fee upon the exhibition of films in order to help defray the expense. And it certainly is rational and appropriate for the City to charge the fee against the showing of erotic films only and not against the showing of all films because it is only the former activity which generates obscenity law enforcement problems. As conceded in Part I of this argument, the authorities must be prepared to prove that the fee is no higher than necessary to support minimum good faith efforts to enforce the obscenity law in regard to the licensed activity.

The acceptability of the results of the reasoning just stated, if not the reasoning itself, is found in lower court decisions in which permit fees imposed on First Amendment activities have been upheld. In addition to Bayside II,

supra, and Hines, supra, cited earlier, these include the following: Star v. Preller, 352 F.Supp. 530 (D. Maryland, 1972) upholding censorship board fees of $3.00 for every 1,000 feet of film, or fraction thereof, involving 16 or fewer frames per foot or $4.00 per 1,000 feet or fraction thereof, otherwise; United States Labor Party v. Codd, 527 F. 2d 118 (C.A. 2, 1975) which upheld a $5.00 a day fee for a permit to operate sound amplification equipment; Universal Film Exchange, Inc. v. City of Chicago, 288 F.Supp. 286 (N.D. Ill. 1968) upholding a fee of $3.00 per 1,000 feet of film; and Borrago v. City of Louisville, 456 F.Supp. 30 (W.D. Ky. 1978) which upheld a $250.00 per annum fee imposed against adult entertainment centers. It should be noted that the case of Star v. Preller, supra, was affirmed by this Court upon appeal as reported at 419 US

956.

Some of the fees found to be lawful in the cases just cited were levied as part of a program of censoring films by requiring a license or permit as a prerequisite to exhibition. The City of Minot has no such program. However if fees may validly be imposed to fund a censorship board then it is difficult to see why the City of Minot should be penalized because it foregos the most odious form of censorship, that of prior restraint, for the perferred form, that of selective criminal prosecution of those who disseminate obscene materials.

III.

The Zoning Ordinance Meets The Constitional Requirements Announced By This Court.

The zoning ordinance challenged herein is modeled upon the one upheld by this court in Young v. American Mini

Theaters, 427 US 50 (1976). It differs from the Detroit ordinance in that it requires concentration rather than dispersal of certain adult uses and it is by its terms applicable to adult uses in existence at the time of its enactment so as to require them to relocate if they wish to continue in business.

Neither difference is fatal to the validity of the Minot ordinance. The rule announced in Young, supra, focuses upon whether the zoning regulation under review impermissibly restricts access to adult materials. The North Dakota Supreme Court found "that there exists a substantial amount of area within Minot's zoning jurisdiction which is available for the purpose of operating an adult entertainment center." (Jr.St. p. 39.) This is all that is required.

Schad v. Borough of Mount Ephraim, 101 S.Ct. 2176 (1981) is not to the con-

trary. The Bookstore misreads that case in thinking that it holds that adult uses must be permitted in any commercial zoning district if a municipality creates one. The facts set forth in Schad establish that the community involved therein maintained only one all-inclusive commercial district and two residential districts. There were no other districts. Since presumably all commercial enterprises were banned in the residential districts, the effect of the ban on nude dancing in the commercial district was the equivalent of a complete community wide ban, and it is apparent that this Court so viewed the case. Nothing in Schad suggests that this Court would not permit a municipality to place adult uses in a district other than the commerical district, as long as the public's access to such materials is not significantly impaired.

The Bookstore never argued in the courts below that the relocation of its operations from the business district to the industrial area would in any way hamper its customers' convenience. Given the smallness of Minot such a claim if now made is unconvincing. Nor did the Bookstore ever contend below that its forced relocation into an industrial district would otherwise hamper its profitability.

To the extent that the Bookstore is denied the protection usually afforded a prior valid non-conforming use in that it is not "grandfathered" for even an amortization period, provision is made in the ordinance itself for the payment of just compensation in the event that this denial of "grandfather" status accomplishes a Fifth Amendment "taking." This issue is not yet ripe for review because the trial court on remand has

not yet determined whether any compensation is constitutionally required, and if so, how much. (See Finding of Fact No. 14, Jr.St. p. 79.)

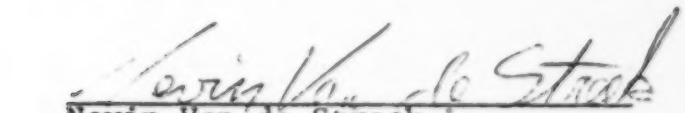
Finally it is contended by the Bookstore that the Minot ordinance must fall because the Minot City Council did not have before it, or did not make, the same sort of factual record as did the governing body of the City of Detroit in Young, supra. This is not strictly true. Although not apparent from the opinions of the trial court and the North Dakota Supreme Court, or from the Findings of Fact, the trial record herein does disclose that the Minot City Council heard testimony concerning adverse economic impacts upon surrounding businesses associated with the opening of the Bookstore. However, even if the record were silent in that regard, this Court could still uphold

the Minot ordinances on the basis of the reasoning of Genusa v. City of Peoria, 475 F.Supp. 1199 (1979) wherein the court held that the governing body did not have to establish a unique history or specific finding of past neighborhood deterioration as a prerequisite to the enactment of a Young-type zoning ordinance. The Court stated "The city's interest in the prospective effect of these businesses on the integrity of neighborhoods may provide the legitimate governmental interest assuming all the other requirements of American Mini Theaters are satisfied." 475 F.Supp. 1204. Likewise this Court can rely upon its earlier statement in Paris Adult Theater v. Slaton, supra, as follows:

> From the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions. Such assumptions underlie much lawful state regulation of

commercial and business affairs.... The fact that a congressional directive reflects unprovable assumptions about what is good for the people, including imponderable aesthetic assumptions, is not a sufficient reason to find that statute unconstitutional. 413 US 61-63.

Respectfully submitted,



Nevin Van de Streek
Counsel of Record
312 Midwest Federal Savings &
Loan Bldg.
Minot, North Dakota 58701
(701) 852-4837
Attorney for Appellees

Appellant's Reply Brief

Office - Supreme Court, U.S.
FILED
NOV 27 1981
ALEXANDER L.

NO. 81-734

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

CENTRAL AVENUE NEWS, INC., AND
DONALD G. GITTELSON,

APPELLANTS,

VS.

THE CITY OF MINOT, A MUNICIPAL
CORPORATION AND POLITICAL SUBDIVISION
OF THE STATE OF NORTH DAKOTA, AND STATE
OF NORTH DAKOTA ex rel. CARROLL ERICKSON,

APPELLEES.

ON APPEAL FROM THE SUPREME COURT
OF NORTH DAKOTA

BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM

ARTHUR M. SCHWARTZ, P.C.
Counsel of Record
1650 Market Street
Denver, CO 80202
(303) 893-2500

TIMOTHY J. AUSTIN
P.O. Box 785
Mandan, North Dakota 58554
(701) 663-9818

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

NO. 81-734

CENTRAL AVENUE NEWS, INC., AND
DONALD G. GITTELSON,

Appellants,

vs.

THE CITY OF MINOT, A MUNICIPAL
CORPORATION AND POLITICAL SUBDIVISION
OF THE STATE OF NORTH DAKOTA, AND STATE
OF NORTH DAKOTA ex. rel. CARROLL ERICKSON,

Appellees.

ON APPEAL FROM THE SUPREME COURT
OF NORTH DAKOTA

BRIEF IN OPPOSITION TO APPELLEES' MOTION TO
DISMISS OR IN THE ALTERNATIVE TO AFFIRM

This Brief is respectfully submitted in opposition to Appellees' Motion to Dismiss, or in the Alternative to Affirm regarding the issues presented in Appellants' Jurisdictional Statement:

1. Whether a licensing ordinance which imposes a $300.00 annual fee on the operation of each and every amusement

device depicting presumptively protected sexually explicit material constitutes an impermissible prior restraint on free speech, when that fee is admittedly used to fund the enforcement of a separate and totally unrelated obscenity statute.

2. Whether a city zoning ordinance which totally excludes adult entertainment centers from commercial areas within the city and permits them to locate only in heavy industrial zones, and then only 1250 feet from pre-existing churches, schools and residential zones, places an impermissible restraint on freedom of speech in violation of the First and Fourteenth Amendments to the United States Constitution and is violative of the principles articulated by this Court in Schad v. Borough of Mount Emphraim, 101 SCt. 2176 (1981) in that no evidence of justification was offered.

TABLE OF CONTENTS

Index	Page
Brief in Opposition to Appellees' Motion to Dismiss or in the Alternative to Affirm.	1
Table of Contents	2
Table of Authorities.	3
I. Response to Appellees' Licensing Fee Analysis	4
II. Response to Appellees' Zoning Analysis	14

TABLE OF AUTHORITIES

	Page
Bayside Enterprises, Inc. v. Carson 450 F.Supp. 696 (M.D. Fla. 1978).	6,7
Bayside Enterprises, Inc. v. Carson 470 F.Supp. 1140 (M.D. Fla. 1979)	4,5,6,7
Chemline v. City of Grand Prairie 364 F.2d 721 (5th Cir. 1966).	9
Chester Branch NAACP v. City of Chester 253 F.Supp. 707 (E.D. Penn. 1966)	10
Grayned v. City of Rockford 408 U.S. 104, 116-17 (1972)	17
Hines v. Winfree 408 Pa. 128, A.2d 698 (1962).	7
International Society for Krishna Consciousness of Western Pennsylvania v. Griffin 437 F.Supp. 666 (W.D. Penn. 1977)	10
Marks v. City of Newport, Kentucky 344 F.Supp. 675 (E.D. Ky. 1972)	11,12
Moffett v. Killian 360 F.Supp. 228 (D. Conn. 1973)	10
Schad v. Borough of Mt. Emphraim 101 S.Ct. 2176 (1981)	13,15,16, 17
Spokane Arcades, Inc. v. Brockett 631 F.2d 135 (9th Cir. 1980) aff'd. ____U.S. _____ (1981)	13

Star v. Preller
352 F.Supp. 530 (D. Md. 1972), vacated and remanded, 413 U.S. 905, on remand, 375 F. Supp. 1093, aff'd., 419 U.S. 956 8

United States Labor Party v. Codd
527 F.2d 118 (2d Cir. 1975). 8

Universal Film Exchange v. City of Chicago
288 F.Supp. 286 (N.D. Ill. 1968) 8

Vance v. Universal Amusement Co.
445 U.S. 308 (1980) reh. den., 446 U.S. 947. . . . 13,14

Wendling v. City of Duluth
495 F.Supp. 1380 (D. Minn. 1980) 10,11

Young v. American Mini Theatres
427 U.S. 50 (1976) 14,17 18

I. RESPONSE TO APPELLEES' LICENSING FEE ANALYSIS

In response to Appellees' Motion to Dismiss or in the Alternative to Affirm, the Appellees are suggesting that the Minot license fee in question here passes constitutional muster because it produces income for the express purpose of defraying future speculative governmental costs which may be incurred in policing a totally unrelated North Dakota obscenity law. In support of that contention, Appellees incorrectly but nonetheless heavily rely on Bayside

Enterprises, Inc. v. Carson, 470 F.Supp. 1140 (M.D. Fla. 1979) ("Bayside II"). An examination of that case, however, reveals that not only is Appellees' reliance misplaced, but also Appellees' representation of the proposition for which that case stands is disingenuous.

Appellees imply that Bayside II stands for the proposition that the Constitution permits a fee to be imposed upon the exercise of First Amendment rights and the proceeds used to defray "expenses associated with overseeing non-speech consequences which flow from the exercise. . ." Appellees' Brief, pp. 13-14. Appellees maintain that Bayside II "upheld the constitutionality of the fee schedule [a schedule imposing licensing fees on the operation of certain speech related "adult" businesses], on the rationale that the proceeds would be used to fund the policing of activity incident to the operation of the adult enterprises. . . . [A]pparently, the court had in mind that among other things prostitution and homosexual activity occurring at the adult

entertainment centers would be investigated." Appellees' Brief, p. 15. In fact, Bayside lends no support to these propositions, but rather, unequivocally supports Appellants' contention that a licensing fee imposed upon the exercise of First Amendment rights may be used for no other purpose than to fund the administrative costs of the licensing scheme. The court in Bayside II began its analysis of the licensing fee by stating that the issue had been "thoroughly explored" in Bayside Enterprises Inc. v. Carson, 450 F.Supp. 696 (M.D. Fla. 1978) ("Bayside I"), a case in which the court struck down a licensing fee because the licensing authority had failed to "demonstrate that the fees were necessary to cover the reasonable costs of the licensing system and that the fees were used for no other purpose than to meet those costs." 450 F.Supp. at 705. The court in Bayside II upheld the fee but only after noting that "the Court has received evidence on [the amount of the fee] chiefly from city officials who have projected what they expect to

expend in administering the [Adult Entertainment] Code's provisions." The Adult Entertainment Code referred to encompassed solely a licensing and zoning scheme.

Not only Bayside I and II, but numerous other cases cited by Appellees belie their assertion that fees may be imposed upon First Amendment activities to finance enforcement of an unrelated law. Indeed, in each of the cases in which a fee was addressed by the Court and upheld, the Court was acting in reliance upon evidence that the fee was no greater than necessary to administer the system imposing the fee. An example is Hines v. Winfree, 408 Pa. 128, 182 A.2d 698 (1962), a case given substantial attention by Appellees in which the Pennsylvania Supreme Court upheld the constitutionality of a $25.00 fee for a one day permit authorizing operation of a sound truck. What Appellees fail to note is that the court upheld the fee only after receiving evidence showing that the fee was less than the amount needed to defray costs of administering the ordinance creating the licensing scheme.

Similarly, United States Labor Party v. Codd, 527 F.2d 118 (2d Cir. 1975), another case relied upon by Appellees, actually supports Appellants' position. The court in United States Labor, supra, addressing the constitutionality of a $5.00 fee for the issuance of a daily permit to use a sound amplification device, specifically stated: "The district court found that the cost to the city of processing the issuance of a permit actually exceeded the five-dollar fee charged," 527 F.2d at 119 (Emphasis added).

In another case cited by Appellees, Star v. Preller, 352 F.Supp. 530 (D. Md. 1972), vacated and remanded, 413 U.S. 905, on remand, 375 F.Supp. 1093, aff'd. 419 U.S. 956, in which a license fee of $4.00 per 1000 feet of film was upheld, the court reached its conclusion in reliance upon a finding that the fees "are necessary to meet the expenses incident to administering [the Article creating the licensing scheme and imposing the fee]." 352 F.Supp. at 543. (Emphasis added).

Moreover, in Universal Film Exchange v. City of

Chicago, 288 F.Supp. 286 (N.D. Ill. 1968), also cited by Appellees, the court upheld a scheme imposing a permit fee of $3.00 on each 1000 feet of film. Appellees do not mention, however, a key statement of the court: "A reading of the very ordinance. . . shows that the fees, far from being a revenue raising measure, are clearly minimal and reasonably related to the cost of running the film review program." 288 F.Supp. 286 (Emphasis added).

The foregoing precedents, cited by Appellees in fact illustrate the principle that a licensing fee can be no greater than necessary to cover the costs of administering the licensing scheme and they are by no means isolated decisions. For example, in Chemline v. City of Grand Prairie, 364 F.2d 721 (5th Cir. 1966) the Fifth Circuit was called upon to determine the constitutionality of a licensing ordinance imposing a $25.00 fee on the issuance of a motion picture display license. Only after finding that "the nominal fee is imposed expressly to 'defray the expense of investigation and issuance of license'" (Emphasis added)

did the court uphold the fee.

Similarly, in Chester Branch NAACP v. City of Chester, 253 F.Supp. 707 (E.D. Penn. 1966) the Court struck down a $25.00 sound truck permit fee on the basis that the city had failed to establish that the fee was reasonably related to actual costs of enforcing and maintaining the licensing system.

In Moffett v. Killian, 360 F.Supp. 228 (D. Conn. 1973), the court, finding that a $35.00 fee imposed by statute on legislative lobbying activities far exceeded the amounts actually needed to administer the registration provisions of the statute, declared it invalid. See also International Society for Krishna Consciousness of Western Pennsylvania v. Griffin, 437 F.Supp. 666 (W.D. Penn. 1977) (holding that a $10.00 per day permit fee imposed on the right to solicit at airports was constitutionally infirm).

This line of cases, each of which supports Appellants' position, culminate in the federal case most on point with respect to the instant litigation, Wendling v. City of Duluth, 495 F.Supp. 1380 (D. Minn. 1980) in which the judiciary adamantly refused to

tolerate a system of prior restraint indistinguishable from the system at hand. Because this case was thoroughly analyzed in Appellants' Jurisdictional Statement, Appellants will not discuss it herein other than to point out that Appellees, apparently unable to rebut the well reasoned analysis of the opinion, have chosen to simply ignore it.

A variation of the type of prior restraint struck down by the court in Wendling was attempted and was met with equal disfavor by the court in Marks v. City of Newport, Kentucky, 344 F.Supp. 675 (E.D. Ky. 1972). In Marks, an extremely analogous system of prior restraint, requiring a potential licensee of an adult entertainment establishment to post a $10,000 bond in order to qualify for a license, was held unconstitutional. The bond, which was intended to insure that the licensee would comply with the prevailing obscenity statute, would be forfeited if the licensee violated that statute.

A careful analysis reveals that the licensing scheme present in the instant case is very similar to,

but much more onerous and obnoxious to First Amendment values, than the system struck down in Marks. In Marks, as in the instant case, the financial burden imposed pursuant to the licensing scheme was intricately woven with a separate and totally unrelated obscenity statute. The $10,000 bond required to be posted in Marks was to insure that the person posting that bond would remain in compliance with the law. Presumably, if that person did comply, the bond would be returned. In the instant case, a potential licensee is required to "post" a sum that could exceed $10,000 to insure that neither the person "posting" that "bond", nor any other adult entertainment establishment in the community, will violate the state obscenity statute. Unlike the situation in Marks, however, the amount collected by the municipality in the instant case will never be returned, irrespective of whether the licensee or anyone else violates the obscenity statute or displays exclusively constitutionally protected speech.

It would indeed by anomalous to conclude on

the one hand that a system requiring a person to post a $10,000 bond which will be returned if that person complies with the obscenity statute is constitutionally infirm; and to conclude on the other hand that a system requiring the payment of a comparable sum as a license fee which will never be returned regardless of whether that person complies with the obscenity statute is constitutionally permissible.

Apparently aware that consistent judicial interpretation renders their actions incapable of justification, Appellees proceed to urge this Court to adopt a new test for determining to what extent a municipality may erode First Amendment rights.

Advocates of "new tests" which would result in greater restriction and suppression of speech related activity are by no means novel to this Court. Such arguments were recently advanced in Schad v. Borough of Mt. Emphraim, 101 S.Ct. 2176 (1981); Spokane Arcades, Inc. v. Brockett, 631 F.2d 135 (9th Cir. 1980), aff'd, _____U.S._____(1981), Vance v.

Universal Amusement Co., Inc., 445 U.S. 308 (1980), reh. den., 446 U.S. 947. Those arguments were rejected by this Court in order that the principles upon which this great nation was founded might endure. Once again, those principles are jeopardized by proponents of a "new test" which not only undermines the very concept of free speech, but also is unworkable.

II. RESPONSE TO APPELLEES' ZONING ANALYSIS

Appellees assert that Minot City Ordinance No. 2336 is constitutional for the same reasons the zoning ordinance in Young v. American Mini Theatres, 427 U.S. 50 (1976) was upheld. An examination of Young reveals, however, that Appellees' reliance upon it is unwarranted. As explained by Appellants in their Jurisdictional Statement, Young is distinguishable from the instant case not only because the Minot Ordinance imposes a much greater restriction on speech, but also because Minot has provided no adequate justification for its Ordinance.

Appellees further maintain that Minot

Ordinance No. 2336, which totally excludes speech related "adult" businesses from all commercial areas within the City, is constitutional so long as "there exists a substantial amount of area within Minot's zoning jurisdiction which is available for the purpose of operating an adult entertainment center." According to Appellees, "this is all that is required," and "Schad v. Borough of Mount Emphraim, 101 S.Ct. 2176 (1981), is not to the contrary." Appellees' Brief, pp. 35-36.

The explicit language of this Court in Schad reveals that Appellees' analysis is specious. A great deal more is required to justify a regulation restricting speech related businesses as does Minot Ordinance No. 2336. As stated in Schad: "Even where a challenged regulation restricts freedom of expression only incidentally or in a small number of cases, we have scrutinized the governmental interest furthered by the regulation and have stated that the regulation must be narrowly drawn to avoid unnecessary intrusion on freedom of expression." Schad, 68 L.Ed. at 681, n.7 citing, United States v. O'Brien, 391 U.S. 367, 376-77

(1968). (Emphasis added).

While the language in Schad establishes that a governmental entity must justify even an incidental burden on speech, the total ban of adult bookstores from all commercial areas of Minot and the requirement that they locate only in limited areas of heavy industrial zones are severe limiting restrictions on speech activities. "The First Amendment requires that there be sufficient justification for the exclusion of a broad category of protected expression as one of the permitted commercial uses in the Borough." Schad v. Borough of Mt. Emphraim, 68 L.Ed.2d at 679.

Before a substantial restriction on speech related entertainment from commercial areas of a city will be upheld, a city's justification must withstand scrutiny and must be supported by evidence. Schad, 68 L.Ed. 682-83. Such an exclusion cannot be justified for reasons normally associated with zoning in commercial districts, that is, to avoid problems such as parking, trash, police protection and medical facilities, unless a city can show that the entertainment excluded "poses problems. . . more significant

than those associated with various permitted uses;. . ." Schad, 68 L.Ed. at 683.

In the instant case, the record is totally devoid of any evidence that the speech-related uses being excluded from commercial areas of Minot pose any problems more significant than problems caused by permitted uses.

Schad further explains that such an exclusion cannot be justified as a reasonable time, place and manner restriction, unless a city can show the entertainment to be "basically incompatible with the normal activity" in the commercial zones. Schad, 68 L.Ed. at 684, quoting, Grayned v. City of Rockford, 408 U.S. 104, 116-17 (1972).

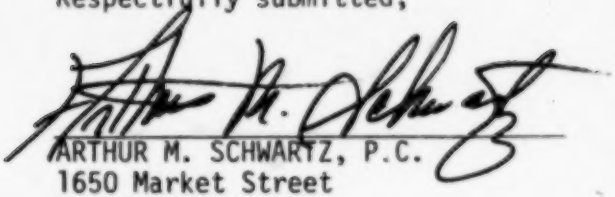
In the present case, as in Schad, Minot has failed to meet its burden of justification and thus Minot Ordinance No. 2336 fails to pass constitutional muster.

In sum, all indications are that the actions of Appellees in passing Ordinance No. 2336 constitute apparently what concerned Justice Powell when he stated in Young that "[C]ourts must be alert to the

possibility of direct rather than incidental effect of zoning on expression and especially to the possibility of using the power to zone as a pretext for suppressing expression. . . ." Young v. American Mini Theatres, 427 U.S. 50 (1976) (concurring opinion).

It is the Appellants' contention, among others, that the Minot Zoning Ordinance No. 2336, in and of itself is a pretext for the suppression of speech. It is further the contention of Appellants that the Minot licensing scheme, No. 2337, in and of itself, is also a pretext for the suppression of constitutionally protected speech. Support for the veracity of these contentions can be found in the realization that both ordinances were enacted simultaneously, and the cumulative effect of the ordinances is to banish presumptively protected speech to areas zoned for heavy industrial usage, where they are then taxed out of existence by confiscatory licensing fees.

Respectfully submitted,



ARTHUR M. SCHWARTZ, P.C.
1650 Market Street
Denver, CO. 80202
(303) 893-2500

TIMOTHY J. AUSTIN
P.O. Box 785
Mandan, North Dakota 58554
(701) 663-9818

Attorneys for Appellants